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IN THE

Supreme Court of the United States

October Term, 1978

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC
Petitioner,
v.
BRIAN F. WEBER, KAISER ALUMINUM & CHEMICAL CORPORATION, AND UNITED STATES OF AMERICA,
Respondents.

KAISER ALUMINUM & CHEMICAL CORPORATION,
Petitioner,
v.
BRIAN F. WEBER,
Respondent.

UNITED STATES OF AMERICA AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,
v.
BRIAN F. WEBER, ET AL.,
Respondent.

BRIEF FOR PETITIONER UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

J. ALBERT WOLL
Woll & Mayer
815 Fifteenth St., N.W.
Washington, D.C. 20005

LAURENCE GOLD
American Federation of Labor and Congress of Industrial Organizations
815 Sixteenth St., N.W.
Washington, D.C. 20006

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG
ELLIOT BREDHOFF
FRANK PETRAMALO, JR.
Bredhoff, Gottesman, Cohen & Weinberg
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

BERNARD KLEIMAN
CARL FRANKEL
Five Gateway Center
Pittsburgh, Pennsylvania 15222

JEROME A. COOPER
JOHN C. FALKENBERRY
Cooper, Mitch & Crawford
409 N. 21st Street
Birmingham, Alabama 35203

Attorneys for United Steelworkers of America

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Respondents.

BRIEF FOR PETITIONER UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

This brief is the joint product of petitioner, United Steelworkers of America (USWA), and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the federation of national and international unions with which USWA is affiliated. The decision to file a single brief reflects the identity of their views on the issue presented, and their desire, in a case that is certain to occasion a multitude of presentations, to minimize the burdens on the Court by stating their common position once and not twice.

QUESTION PRESENTED

Does Title VII of the Civil Rights Act of 1964 make unlawful a program, adopted by an employer and union in collective bargaining, which reserves for black bidders 50% of the openings in an in-plant craft training program in order to eliminate a racial imbalance in the skilled craft workforce?

STATEMENT OF THE CASE

This action was initiated on December 31, 1974, in the United States District Court for the Eastern District of Louisiana, by respondent, Brian F. Weber, a white production employee at the Gramercy, Louisiana plant of Kaiser Aluminum & Chemical Corporation (hereinafter "Kaiser"). Weber alleged that petitioners Kaiser and the United Steelworkers of America, AFL-CIO-CLC (hereinafter "USWA"), the exclusive bargaining agent for all production and craft employees at the Gramercy plant, were discriminating against him and other similarly situated white employees in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

The alleged unlawful discrimination was the implementation by Kaiser and USWA of a nationwide collectively bargained program designed to eliminate racial imbalance in skilled craft positions. The program was established in the Kaiser-USWA collective bargaining agreement signed on February 1, 1974, and is applicable to all fifteen Kaiser plants throughout the country. The program provides that each Kaiser plant is to set as a goal that the proportion of blacks holding craft jobs match the proportion of blacks in the workforce in the community from which the plant draws its employees.[1] To meet that goal, on-the-job training programs were established at each plant to teach production workers the skills necessary to become craftsmen; the program reserves for black employees 50% of the openings in these newly created in-plant training programs. The complaint alleged specifically that the filling of craft trainee positions at the Gramercy plant pursuant to this program had resulted in junior black employees receiving such positions in preference to more senior white employees.

[1] Literally the program refers to "minority" employees rather than "black" employees. The term "minority" is used in the sense defined in the reporting requirements of the Equal Employment Opportunity Commission (hereinafter "EEOC"). (App. 138). In the context of this case, in which all minority beneficiaries have been and are likely to be black, the terms "minority" and "black" may be used interchangeably. (App. 127-128, 165-170). The program also establishes goals for filling craft training vacancies with female bidders; the goals for females are in addition to the goals for minorities, although successful female bidders for such vacancies, regardless of race, may be counted against the 50% reserved for minorities. (App. 145, 168).

The case was maintained as a class action pursuant to Rule 23(b) (2), with the plaintiff class defined as follows (App. 24):

> "All persons employed by Kaiser Aluminum & Chemical Corporation at its Gramercy, Louisiana works who are members of the United Steelworkers of America AFL-CIO, Local 5702, are not members of a minority group, and have applied or were eligible to apply for on-the-job training programs since February 1, 1974."

Following trial of Weber's application for a permanent injunction, the district court ruled that the Kaiser-USWA program's use of a racial quota in selecting craft trainees does violate Title VII, and, accordingly, entered judgment in favor of Weber and the plaintiff class and granted a permanent injunction prohibiting Kaiser and USWA "from denying plaintiffs, Brian F. Weber and all other members of the class, access to on-the-job training programs on the basis of race." (App. 171).

A divided panel of the United States Court of Appeals for the Fifth Circuit affirmed.

STATEMENT OF FACTS

The Plan

As a result of free collective bargaining, Kaiser and USWA entered into a nationwide agreement on February 1, 1974 covering terms and conditions of employment at 15 Kaiser plants (hereinafter "the master agreement"). That

agreement addressed a general problem which was being addressed by USWA at approximately the same time in its collective bargaining negotiations with each of the other companies in the aluminum industry, each of the companies in the can industry, and each of the companies in the steel industry (App. 93-94): the virtually complete absence of blacks in skilled craft jobs in the covered plants—an absence which contrasts, in many plants, with the presence of large numbers of blacks in production jobs. The approach to this problem taken in the 1974 nationwide Kaiser-USWA agreement was the same as that taken in agreements reached between USWA and the other companies mentioned. (*Id.*)[2]

The master agreement called for a goal to be set at each of the fifteen Kaiser plants for the proportion of minorities to fill positions in each category of craft jobs. (App. 137). The agreement further provided that such goals were to be achieved on the following basis (*Ibid.*):

> "As apprentice and craft jobs are to be filled, the contractual selection criteria shall be applied in reaching such goals; at a minimum, not less than one minority employee will enter for every non-minority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates."

The master agreement established a joint company and

[2] In the steel industry, this agreement was incorporated into an industrywide consent decree receiving judicial approval. *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert denied* 425 U.S. 944 (1976). However, as the decree court has recently stated, the "essence" of that decree "is a collective bargaining agreement between the union and the companies"; neither the parties nor the court had examined the facts at each of the 250 plants covered by the decree to determine whether there had been prior employer discrimination, nor had the parties or the court attempted to limit the quota to identifiable victims of past discrimination. *United States* v. *Allegheny-Ludlum Industries, Inc.*, No. CA 74-P-0339-S (N.D. Ala.), Memorandum Opinion filed March 21, 1978, pp. 3, 8-9.

union committee to, *inter alia*, take the steps necessary to put that minority quota provision into action. (*Id.*) The goals called for by the master agreement were set for each plant based upon the percentage of minorities in the workforce in the community from which the plant draws its employees. (App. 60, 145, 155).[3] And, the joint committee executed a memorandum of understanding, again applicable to all fifteen Kaiser plants, supplementing the master agreement with, *inter alia*, the following provision covering the filling of craft jobs through on-the-job training programs which were to be established (App. 145):

> "As on-the-job training and/or apprentice programs are established, each training class entering will be filled on a 50-50 basis. Employees in each training class shall be selected on the basis of the existing practice in each plant, however, 50% of the training class will be composed of only minority and/or female employees, including, if necessary, off the street hirees."

These provisions of the master agreement and the implementing memorandum of understanding (hereinafter sometimes referred to together as "the 1974 agreement") constitute the core of the national program established by Kaiser and USWA to increase the proportion of minorities in skilled craft positions at all of the Kaiser plants. The program was negotiated without regard to specific conditions at any one plant, and certainly was not based on an assessment of the particulars of the situation at the Gramercy plant. (App. 93-94)

Why The Plan Was Adopted

At trial, the director of equal opportunity affairs for "the entire Kaiser corporation," Mr. Thomas Bowdle,[4] testified as to the reason behind Kaiser's agreement to the

[3] The goals varied considerably from plant-to-plant ranging from 39% down to 1%. (App. 155.)

[4] Bowdle's name is spelled incorrectly in the trial transcript as "Bouble."

program.[5]

Bowdle made clear Kaiser's view that the discrepancy in the proportion of minorities in craft positions at Kaiser plants was not the result of racial discrimination by Kaiser in any of its employment practices, and that the minority employees favored by the new program were not the victims of any discrimination by Kaiser. (App. 99-101). Despite consistent urging from USWA over the years, Kaiser had not, prior to 1974, established apprenticeship or craft training programs enabling in-plant production workers to train and qualify for craft positions (App. 73, 97)[6]; rather, Kaiser filled its craft positions by hiring fully-qualified craftsmen from outside its workforce. (App. 71, 77, 95-96). Bowdle stated his opinion that the low number of blacks in craft positions throughout Kaiser's plants was a product of "fundamental effects of past discrimination in the field of education, job training, etcetera, ..." (App. 99-100), the same kind of "pervasive discrimination," which, in Bowdle's view, has resulted in there being relatively few minority lawyers, doctors, and engineers. (App. 100). Bowdle further stated that in the years preceding the 1974 agreement with USWA, Kaiser had made "a major effort in every one of our facilities" specially to recruit minorities from outside Kaiser to fill skilled craft positions but that these efforts were "fundamentally unsuccessful." (App. 91).

With this background, Bowdle testified as to Kaiser's motivation in agreeing to the program of racial preferences in the 1974 agreement with USWA (App. 91-93, 116):

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[5] App. 89-94. Another witness, Mr. English, the Superintendent of industrial relations for Kaiser at the Gramercy plant, also gave some testimony on this subject, but acknowledged that he did not participate in establishing the national program. App. 64-66, 83-84.

[6] The record in this case shows that an in-plant craft training program for production employees who begin with no craft skills costs the Company in the range of $15,000 to $20,000 per trainee per year over a training period of 2½ to 3½ years. (App. 67-68).

"... I think that prior to the 1974 Steelworkers negotiations, and there have been lots of discussions about this, I think anybody who has been active in the field of equal employment opportunity, affirmative action, recognized that unless employers and unions, jointly or severally, did something creative, in effect, to change the pattern, that there would be no change in the present effects of past discrimination, as it relates to craft occupations, and I think that it was totally consistent with the concept of affirmative action that the Steelworkers and the members of this industry and our company came up with the concept that appeared in our 1974 labor agreement. Something had to be done to change the scene, and the concept of changing seniority systems to broaden opportunities, the concept of aggressively, creatively changing the method by which we manage our human resources, this was not inconsistent with what was going on in the industry. Certainly, it was not inconsistent with the best thinking of the professionals in this field in this country, whether they are with companies, civil rights organizations, Federal government.

"Q. Are you explaining, then, sir why the new procedure for craft training was instituted as part of the 1974 agreement?

"A. Absolutely.

"Q. Could you state, as specifically as you know, and I would assume you know, since this falls within your area of corporate responsibility, what the background reasons were, specifically, for the change in program instituted in the 1974 agreement?

"A. Certainly. In the latter part of 1973, it was very apparent to us, as a company, that if we were going to bring into our industry minorities, we happen to be talking about blacks in this particular area, into the craft occupations, we felt we would have to, as a company, modify our seniority applications, which would give preference, in fact, to minorities. As I indicated, that was not, of course, an original idea in the total concept of affirmative action, but in the latter part of 1973, Mr. Stewart, who is our Vice-President of industrial relations, and I, in meetings with the Steelworkers,

discussed this problem with them. There was certainly a concert of opinion that there was a problem, and one that had to be solved, ...

"Q. Other than compliance with the proper management of human resources and compliance with the company's own policy, and perhaps, the Steelworkers' own policy, were there any practical, pragmatic reasons occurring or taking place that would have added emphasis, perhaps, to the 1974 negotiations?

"A. Oh, certainly, any compliance review that we might have had by any agency, and the two agencies that review us are the Atomic Energy Commission and the Department of Defense, I don't think I have sat through a compliance review where it wasn't apparent that there was few, if any, minorities in the craft occupations, and there was always, certainly, the suggestion, on the part of the compliance review officers, that we devise and come up with methods and systems to change that particular thing. I suppose, as a company, we could have taken a position that we will advertise in all the black newspapers, we will do this and we will do that, and end up with the conclusion that the availability of qualified minorities in the market place for employment with craft skills is minimal, and end up baying at the moon, as it were. But I don't think the concepts of affirmative action permit a company—I don't think it permitted us, policywise, to merely say we can't do anything about this problem, because it permeates all the things that affirmative action is concerned with."[7]

[7] In answer to a question from the district court as to what he meant by affirmative action, Bowdle stated (App. 109):

"I think the concept of affirmative action, affirmative action is a plan for an employer to develop, to do all of those things that creates opportunities of employment for all citizens. In the process of that, to remove barriers that would make that affirmative action a hollow gesture. It's not a passive thing, there is a difference between equal employment opportunity and affirmative action. Those are not synonymous. Opening the doors of employment to minorities or females, where previously they had been barred from employment, is but one step. To then create an employment environment where they can achieve and compete and perform is where you get into the concept of affirmative action."

• • •

"... It has been a growing revelation, I guess. I don't think, in response, that the pressures, per se, of the Federal agencies responsible, say, for compliance, have brought industry to their knees and forced them to do things that they didn't think, in their good judgment were appropriate responsibilities on their part."[8]

As to the motivation of USWA, Bowdle stated that "they're highly motivated and I would have to say the word creative, in attempting to create a situation of equal employment opportunity and to eliminate the present effects of past discrimination." (App. 96-97).

The district court made the following findings of fact regarding Kaiser's reasons for agreeing to the quota system in the 1974 agreement (USWA Pet. App. A at 5a-6a):

"Moreover, it is apparent from the evidence that Kaiser's decision to bargain for the herein controverted quota system in the 1974 Labor Agreement, which quota system applies on a nationwide basis, was prompted not only by its desire to increase the percentage of its black craftsmen, and afford more job opportunities to blacks, but also by its concern about compliance with rules and regulations issued by the Office of Federal Contract Compliance (OFCC), an agency of the Executive Branch of the U.S. Government. There is no evidence that Kaiser, in incorporating this quota system in the 1974 Labor Agreement, did so with a view toward correcting the effects of prior discrimination at any of the fifteen plants to which the system had application. To the contrary, it appears that satisfying the requirements of OFCC, and avoiding vexatious litigation by minority employees, were its prime motivations."

The district court made no finding respecting USWA's

[8] Substantially less than one percent of Kaiser's business is with the government. Kaiser does have substantial business "with other industries that do business with the government." (App. 94.)

reasons for agreeing to the quota system in the 1974 agreement.

No Prior Discrimination

In 1973, the year prior to the new national agreement going into effect, 5 out of 273 craft employees at the Gramercy plant were black. (App. 167). This proportion of black craftsmen, 1.83%, contrasted with the proportion of black production employees at the Gramercy plant at about the same time: 14.8%. (App. 60).

Kaiser's Superintendent of Labor Relations at the Gramercy plant, Dennis E. English, testified that prior to the 1974 program, Kaiser had hired nearly all of the plant's craftsmen from "off the street," (App. 71, 77, 125),[9] and that the proportion of black craftsmen in the plant was the same as the proportion of trained craftsmen who are black in the community from which the plant draws its workforce. (App. 76). English stated that in the years preceding the 1974 agreement, special efforts had been made by Kaiser to recruit black craftsmen to work at the Gramercy plant (App. 62-63):

> "We have done several things. For the past several years, because of what Kaiser as a company wants to do, because of what we have agreed to with the Union, and because of annual compliance reviews with the Government, we have set goals, timetables, to try to achieve a larger percentage of minorities in the crafts.

[9] The lone exceptions, which the court below considered *de minimis* (USWA Pet. App. B at 31a-32a, n. 13), involved 28 production employees with substantial prior craft-related experience or training who were provided a limited on-the-job program to complete their craft training and qualify them as craftsmen. (App. 64-65, 72, 126-127). Such training was much less expensive than the full-blown training program instituted under the 1974 agreement, because the recipients, by virtue of their prior craft-related experience, required a much less extensive training program over a shorter period of time. (App. 75, 95-96; see also note 6, *supra;* pp. 12-13, *infra.*)

> We have advertised in Baton Rouge and New Orleans newspapers. We advertise in minority-only newspapers when craft vacancies become available. We keep separate craft application files, so that any time the craft vacancies comes up, our first thing, we will go to that craft file and we will try to locate qualified black craftsmen, and we always look for the blacks before the whites, and it's quite difficult, because they aren't available.
>
> "Q. Why, then, after such a program, did you have only five or six blacks in the maintenance and skilled crafts, prior to the institution of the '74 agreement?
>
> "A. Once again, we can advertise all we want, and we can keep all the files we want, and look as hard as we can look, and they just aren't available.
>
> "Q. What do you mean by "not available?" They're all working somewhere else?
>
> "A. There are very few that are trained and qualified to begin with, and any black minority today who is qualified is working, because companies like Kaiser anywhere are hiring blacks first, or they're attempting to get blacks on the payroll."

The district court found as fact that Kaiser had not prior to the institution of the 1974 program discriminated against blacks in the hiring of production or craft employees (USWA Pet. App. A, at 5a):

> ". . . The evidence further established that Kaiser had a no-discrimination hiring policy from the time its Gramercy plant opened in 1958, and that none of its black employees who were offered on-the-job training opportunities over more senior white employees pursuant to the 1974 Labor Agreement had been the subject of any prior employment discrimination by Kaiser.
>
> "With regard to craft positions, Mr. English testified that prior to 1974, only five blacks had been hired into these positions, making the black craft population only 2-2½ percent of the total Gramercy plant craft population. Although this figure might suggest that Kaiser had discriminated against blacks when filling craft positions, Mr. English testified that prior to 1974,

Kaiser had vigorously sought trained black craftsmen from the general community. Although its efforts to secure such trained employees included advertising in periodicals and newspapers published primarily for black subscribers, Kaiser found it difficult, if not impossible, to attract trained black craftsmen."

The Plan's Operation at Gramercy

Under the 1974 agreement, a full-fledged on-the-job craft training program was established at the Gramercy plant, designed for trainees with no prior craft training or experience. English described the new program as follows (App. 67-68):

> "... When the employee comes to us now, in a training program, he, for the most part, has no training or experience or background whatsoever in mechanical or electrical ability, or whatever the training program is. For that reason, the training program, based upon the individual craft, will last either two and a half or three and a half years, that is, on-the-job training out in the field. At the same time, he gets about four hours of schooling per week by a training supervisor who oversees the training program, and at the same time, he's required to take and pass International Correspondence School home studies, home courses, and these courses, in each of the programs, range, I think, from as low as 40 courses in the air condition repairman training program, to something like 66 courses in the electrical program. So, we have a combination of on-the-job training, classroom instruction, and home study.
>
> "Q. Has this program been evaluated in terms of what it may be expected to cost the company per trainee?
>
> "A. Yeah, we put a figure on that. We feel that on an annual basis, the minimum cost is between 15 and $20,000 per trainee."

Vacancies in trainee positions in this program are filled, to the extent possible, from among competing bidders in the plant's production workforce. (App. 127-128, 145). There is no prior experience requirement for a craft trainee position;

in fact, the only requirement for such a position is physical fitness. (App. 73-74, 127). As provided in the 1974 agreement, the selection of successful bidders for these positions was based strictly on length of plant seniority, subject only to the limitation that at least half of the trainees selected for the program in each "craft family" be black. (App. 73-74, 137, 145, 168-169).[10] That limitation was to prevail until the goal of 39% black craftsmen in each craft family was achieved. The 39% figure was the particular goal set for the Gramercy plant pursuant to the formula adopted under the 1974 agreement (App. 60):

> "... What that agreement tries to do, at Gramercy, and we're one of many plants, we have found, once again using the available statistics, that there are about 39 percent minority employees in the available work force in the two parishes around us. As a result of that, we, in line with that agreement, are striving to obtain, at some future date, a 39 percent minority population in each of the craft families, as is spelled out in that agreement."

See also App. 145, 155.[11]

Between the time the training program under the 1974 agreement went into effect and the time of the injunction issued by the district court, thirteen craft trainee positions were put up for bid and filled at the Gramercy plant. (App. 66, 127-128, 166). These positions were all filled in accordance with the selection criteria established by the 1974 agreement. (App. 72-75, 127-128).

As trainee positions became available they were posted for bidding, with all production employees at the Gramercy plant eligible to bid. For each such posting, a predetermined

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[10] A craft family is a grouping of distinct craft jobs. The craft families used under the 1974 agreement were determined according to "Federal Court Guidelines." (App. 145, 154.)

[11] The record shows that the 39% goal at Gramercy was the highest of all the Kaiser plants; the lowest being a 1% goal. (App. 60-61, 155.)

number of the posted vacancies were allotted to each race (App. 74-75, 127-128); as explained by English, "we stipulated" that within each craft family "the odd number, or the first of any two" vacancies, would be given to a black. (App. 74). The bid lists were then coded for race, creating in effect racially separate seniority lists. (App. 74-75, 127-128, 156-164). Each vacancy set aside for a black was filled from among the black bidders on the basis of plant seniority; and, a like procedure was followed for the filling of vacancies set aside for whites. (*Id.*)

In this manner, by the time of trial, thirteen craft trainee positions had been filled under the 1974 agreement, seven positions by blacks and six by whites. (*Id.*) Each of the seven black trainees secured his position in preference to more senior white bidders as a result of the racial quota requirement in the 1974 agreement. (*Id.*) None of these seven was selected because he was a victim of any prior discrimination against blacks by Kaiser. (App. 81; USWA Pet. App. A at 5a).

INTRODUCTION AND SUMMARY OF ARGUMENT

(1) This case presents, in an entirely distinct legal and factual context, an aspect of the profound social dilemma considered in *University of California Regents* v. *Bakke*, ... U.S. ...., 46 L.W. 4896 (June 28, 1978). That dilemma is how at this time to provide equal opportunity in our society, when (1) historically minorities and women have been denied that opportunity and the effects of that denial cannot be obliterated by "color-blindness," but (2) compensatory efforts on behalf of minorities and women impose competitive disadvantages on other individuals who have committed no wrong.

The dilemma is particularly acute for an employer and union when whites hold most of the skilled craft jobs in a plant and blacks occupy a relatively large proportion of

production or less skilled jobs. This dichotomy is common, and is often not the product of discrimination by the employer whose workforce is affected or by the union representative, but rather, as the courts below found here, results from social forces beyond their responsibility or control. Yet, regardless of the reason, the mere existence of this split may lead to a perception of racial discrimination which is injurious to the morale and efficiency of the employer's workforce and to the cohesiveness of the union's membership.

While USWA has concluded that the benefits of a color-conscious training policy outweigh its costs, we do not argue that our choice is the only one for society as a whole, that it is required by law, or even that it is permitted to Government. But we are emphatic that Congress in Title VII of the Civil Rights Act of 1964, as amended, left employers and unions in the private sector free to take immediate effective steps to secure racial balance in previously all-white job categories. The sole question in this case is whether that reading of the Act "reconstitute[s] the gamut of values current at the time the words were uttered." *Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612, 620 (1967) (quoting L. Hand, J.).

Title VII prohibits "discrimination" on the basis of race, and § 703 (j) in stating the limits of that prohibition provides that the Government may not "require" employers or unions to grant racial preferences to eliminate a racial imbalance. The natural inference is that an employer or union is *permitted* to do so.

That inference is confirmed by the legislative history, as we show by tracing the 1964 Congress' consideration of Title VII and, particularly, its consideration of the Title's application to racial quotas and preferences. This topic was at the forefront of the legislators' attention, and the relevant materials are voluminous. But the lessons are clear.

First, Title VII is separate in origin from the remainder of the Civil Rights Act of 1964. It is the product of the

House Education and Labor Committee; the other titles of the Act are the product of the Kennedy Administration—which because of the intensity of opposition to a fair employment practices provision chose not to include such a provision in its proposed bill—and of the House Judiciary Committee.

Second, Title VII, as enacted in 1964, governed only the private sector. Its sole constitutional predicate was the Commerce Clause; it was viewed by Congress as a further step—albeit one of immense consequence—in the series of measures regulating facets of the private employment relationship.[12] Congress recognized that it was legislating in an area until then unregulated either by the Constitution or by federal law. It was writing social legislation[13] on a

[12] As Senator Humphrey said in his speech "lay[ing] the affirmative case for the bill before the Senate" (110 Cong. Rec. 6528):

> "The constitutional basis for Title VII is, of course the Commerce Clause . . . I think there can be no question that if Congress can prevent discrimination in employment on the basis of membership or nonmembership in a labor union, as it does in the National Labor Relations Act, it can prevent discrimination on the basis of race, color, religion, sex, or national origin. . . ."

Id. at 6548. See also *id.* at 1528 (Representative Celler); 7207-10 (Senator Clark); 8314 (Senator Cooper); 8315 (Senator Hart); 14442 (Senator Javits); 14451 (Senator Keating).

[13] As Sen. Cooper, a supporter, aptly described:

> "So far as the FEP provision of the bill is concerned, I agree with [Senator Stennis] that this is a matter of legislative policy. The right to a job is not a right which is specifically enumerated in the Constitution. But Congress may act if it so chooses, to correct an existing wrong—such as job discrimination. . . . I believe Congress has the authority to enact such legislation, as a matter of policy, under the commerce clause. Whether Congress desires to do so or not and how far such legislation will reach in eliminating practices of discrimination in employment is ultimately a question for the Congress, in its best judgment, and I hope wisdom, to decide." *Id.* at 8314.

(footnote continued next page)

"clean slate," and not, as this Court found with respect to Title VI, attempting to particularize or enforce the general commands of the Fifth and Fourteenth Amendments.[14] The impetus for action was the economic deprivation suffered by blacks and other minorities throughout the Nation—a deprivation which Congress believed attributable in significant part to employment discrimination—and the consequent impact of that deprivation upon the American economy.[15] Similar conditions applicable to all working peo-

On the breadth of Congress' discretion generally in regulating employer-employee relations in private industry see, e.g., *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1; *Railway Employees' Dept.* v. *Hansen*, 351 U.S. 225; *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1.

[14] Title VI, the subject of *Bakke*, was an exercise of federal power over a matter in which the federal government was already directly involved: the prohibitions against race-based conduct contained in Title VI governed "program[s] or activit[ies] receiving Federal financial assistance." § 601 of Title VI. Congress was legislating to assure federal funds would not be used in an improper manner. There was in this context no basis for concern over federal intrusion into purely private decision-making. See *infra* at pp. 18-19. Indeed, as the various opinions in *Bakke* point out, Congress assumed that existing Constitutional prohibitions were already applicable to the conduct covered in Title VI.

Congress' own recognition of the importance of distinguishing Titles VI and VII was reflected in its ultimate judgment to add to the bill what emerged as § 604 of Title VI, 42 U.S.C. § 2000d-3, a provision making clear that Title VII, and not Title VI, is to regulate the employment practices of private employers. The sponsor of this provision, Senator Cooper, explained that its purpose was to make clear that "it was not intended that title VI would impinge on title VII." 110 Cong. Rec. 11615.

[15] Senator Clark:

> "Economics is at the heart of the racial situation. The Negro has been condemned to poverty because of a lack of equal job opportunities. This poverty has kept the Negro out of the mainstream of American life. This is the issue that confronts us on the economic side." 110 Cong. Rec. 13080.

(footnote continued next page)

ple had prompted enactment three decades before of the National Labor Relations Act which forbade discrimination of a different kind, and which served as a model for the drafting of much of Title VII.[16]

Third, from the start, enactment of Title VII—indeed, of the entire Civil Rights bill—depended upon developing a bipartisan coalition of legislators whose philosophies about the desirable extent of government intrusion upon free enterprise varied widely. Because the Southern Democrats were almost unanimously opposed to any bill, there could not be a majority in the House (nor, of course, the two-thirds necessary to invoke cloture in the Senate) without the support of a substantial number of legislators who traditionally resisted federal regulation of private business. For these legislators, Titles II and VII were the most deli-

H. Rep. No. 914, 88th Cong., 1st Sess. (1963), p. 149 (Additional Views of Republican sponsors):

> "The failure of our society to extend job opportunities to the Negro is an economic waste. The purchasing power of the country is not being fully developed. This, in turn, acts as a brake upon potential increases in gross national product. In addition, the country is burdened with added costs for the payment of unemployment compensation, relief, disease, and crime."

Senator Humphrey:

> "Discrimination in employment is not confined to any region —it is widespread in every part of the country. It is harmful to Negroes and to members of other minority groups. It is also harmful to the Nation as a whole. The Council of Economic Advisors has recently estimated that full utilization of the present educational attainment of non-whites in this country would add about $13 billion dollars to our gross national product." 110 Cong. Rec. 6547.

See also *id.* at 1639 (Representative Lindsay); 2603-04 (Representative Ryan); 2606 (Representative Gill); 6562 (Senator Kuchel); 7240-41 (Senator Case); 14296-97 (Senator Fong).

[16] *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 419 (1975); *Franks* v. *Bowman Transportation Co.,* 424 U.S. 737, 769, 774-775 and note 34 (1976). See also n. 12, *supra.*

cate and difficult provisions in the bill:[17] Title VII in particular presaged a substantial new federal role in the employment decisions of America's businessmen, and in the joint decisions of employers and unions in collective bargaining. With the balance of power in the hands of these legislators, the concern that has consistently provided the limiting principle to employee protective legislation—that government dictation of employment conditions and decisions not undermine the free enterprise and free collective bargaining systems[18]—came to the fore. These legislators demanded, and the more liberal sponsors agreed, that a guiding principle in shaping Title VII be that stated in the Additional Views of the Republican sponsors in the House:

> "[M]anagement prerogatives and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discriminatory practices."[19]

Fourth, in an effort to exploit the concerns of potential conservative supporters, the opponents of Title VII contended that it would not merely prohibit discrimination on the basis of race, creed, color, sex or national origin; it would, they asserted, require employers to prefer those in previously disadvantaged groups or to hire and promote on

[17] See, *e.g.,* 110 Cong. Rec. 8195, 13087 (Senator Dirksen); 9152 (Senator Allott); 9675 (Senator Aiken); 14190 (Senator Cotton); 14303 (Senator Simpson); 14454 (Senator Mundt); 14483 (Senator Hickenlooper); 14484 (Senator Curtis); 2603 (Representative Hall); 2758 (Representative Gurney); 2759 (Representative Morton); 2782 (Representative Brock).

[18] See, *e.g., Labor Board* v. *Jones & Laughlin,* 301 U.S. 1, 45-46; *Bus Employees* v. *Wisconsin Board,* 340 U.S. 383, 395-396 n. 21; *Porter Co. v. NLRB,* 397 U.S. 99, 103-106.

[19] H.Rep. No. 914, 88th Cong. 1st Sess., p. 150 (1963). See also 110 Cong. Rec. 1518 (Representative Celler); 15893 (Representative McCulloch); 12593-94 (Senator Clark re Senator Dirksen).

a quota basis. The sponsors of the bill consistently denied that they had an intent to intrude to that extent on private employment decisions or that the bill would have such an effect. To the contrary, they gave assurances that Title VII could in no circumstances be used to impose quotas on unwilling employers or unions, not even by a court after a defendant is found to have violated the Act. In the Senate, these disclaimers proved insufficient to break the filibuster against the bill, and consequently § 703(j) was among the series of amendments proposed by Senator Dirksen to obtain the votes necessary for cloture. Congress thus rejected government imposed quotas, in any form, as intrusions upon private decision-making which were not to be tolerated under the Act.

Fifth, in direct contrast, the conservative sponsors' philosophy of the proper role of government did not incline them toward *forbidding* the adoption by private parties of quotas to eliminate racial imbalance. Congress, to be sure, intended Title VII to extend to white males, but the examples cited during the debates which elicited that assurance were of a piece with the acts of "ugliness," "intolerance," "bigotry," "bias," "prejudice," and "racial preference"[20] which had for so long subjugated blacks and other minorities.[21] The lengthy debates over the question whether Title

[20] See, *e.g., id.* at 6000 (Senator Humphrey); 4757 (Senator Humphrey); 14297 (Senator Keating); 8350 (Senator Proxmire); 2783 (Representative St. Onge).

[21] Examples were cited during the debates of black unions excluding whites from membership, 110 Cong. Rec. 2551; black employers hiring only black employees, *id.* at 2550, 2552, 2558-59, 2562, 2782, and even white employers hiring only black employees (restaurants in the South with exclusively black waiters, *id.* at 2726; and railroads with exclusively black porters, *id.* at 2557). Rep. Celler stated the vice in these practices: if a black union excludes whites it is "exactly the same" as a white union excluding blacks. "Both are clear examples of discrimination. It works both ways," *id.* at 2552.

(footnote continued next page)

VII would *require* quotas provides ample evidence from which a clear Congressional intent is discernible not to *forbid* private decisions to use quotas to eliminate racial imbalance. In the House, every pertinent legislative statement confirms that Title VII neither requires nor forbids racial balancing. In the Senate, some of the liberal sponsors voiced the view early in the debate that employment decisions must always be colorblind, but once the conservative sponsors drafted and introduced § 703(j) every subsequent statement (including the liberals') was consistent with the House view.[22]

Sixth, the extensive debate on voluntary racial balancing to cure *de facto* segregation in school systems which took place under Title IV influenced the shape of the legislative decision under Title VII. Some school systems had opted for that course in 1964, and in deference to local decision-making Congress determined neither to require nor to forbid that practice. That precedent was repeatedly cited in the debates as a parallel to the decision under Title VII reflected in the wording of § 703(j).[23]

Finally, while Congress re-examined Title VII in 1972, and amended it in certain unrelated respects, nothing which occurred in 1972 alters the construction which the language of § 703(j) and the legislative history compel: that Title VII does not forbid the adoption by private parties of quotas to eliminate racial imbalance.[24]

(2) The detailed development of the points just outlined

Rep. Corman added that permitting black employers to hire black salesmen because their customers are black would require permitting white employers to hire only whites in the same circumstances—perpetuating the very attitudes the bill was designed to erase, *id.* at 2559; see also *id.* at 2563 (Representative Roosevelt).

[22] See pp. 29-66, *infra.*

[23] See pp. 66-70, *infra.*

[24] See pp. 74-75, *infra.*

establishes that Title VII does not prohibit private parties from adopting quota programs of the type at issue here. On that basis the decision of the court below should be reversed. We believe that no other issue is presented. But we meet two alternative theories which the Government, and others, have sought to insert into this case: First, that even if programs of the type here are generally forbidden by Title VII, there is nevertheless a zone in which private parties are permitted to adopt such programs, a zone which is derived from the presumed power of courts to order quotas as remedies in Title VII cases. Second, that even if private voluntary programs such as that here violate Title VII, employers and unions may nevertheless be authorized to undertake such programs by the Office of Federal Contract Compliance (OFCC).

Obviously, if we are correct in our basic position that Congress intended to permit private parties to adopt quotas to eliminate racial imbalance, the question whether there is, as a result of an assumed power of courts to order quotas, some zone in which private quota programs, otherwise violative of Title VII, are permissible, never arises. And, if our position is wrong, it would still be inappropriate to consider this alternative theory here because the factual predicate for the theory is not presented on the record of this case.

On the merits, the theory is flawed in that Congress expressly rejected its major premise. Floor leaders and principal supporters of Title VII in both Houses assured their fellow members in unambiguous terms that under no circumstances would Title VII empower courts to direct defendants to adopt racial quotas, even in cases where discrimination in violation of the Act is proved. The language of the 1964 and 1972 Acts confirms those assurances.

If our basic position is correct, there is no reason, either, to consider the second alternative theory noted. For if Title

VII does not prohibit the kind of program here at issue, authorization from OFCC would be unnecessary. And if the position for which we contend is not correct, then all quota programs of the type at issue here violate Title VII. The OFCC cannot, by virtue of power derived from an executive order, make legal what Congress has made illegal.

ARGUMENT

I. THE KAISER-USWA SELECTION PROGRAM DOES NOT VIOLATE TITLE VII.

This case turns entirely upon the proper construction of § 703 of Title VII, which must be drawn from the statutory language and the legislative history. Before turning to these materials, we pause to demonstrate that the question presented here is entirely open.

This question was not resolved by this Court's holding in *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), that Title VII forbids racial discrimination against white male employees just as it does discrimination against minorities and women. The *McDonald* Court "emphasized" that it was not deciding the lawfulness of "affirmative action programs" (*id.* at 281 n. 8):

> "Santa Fe disclaims that the actions challenged here were any part of an affirmative action program, . . . and we emphasize that we do not consider here the permissibility of such a program, whether judicially required *or otherwise prompted.*" (Emphasis added.)

Nor was the issue in this case resolved by this Court's ruling in *Bakke, supra,* that Title VI of the Civil Rights Act of 1964 forbids a state university which receives financial assistance from the federal government from reserving a certain number of student admissions solely for minority students. Title VI and Title VII are not interchangeable; indeed, as this brief shows, they differ in ways critical to the resolution of the question now before this Court.

A. The Statutory Language

Section 703 of Title VII in its entirety "delineates which

employment practices are illegal and thereby prohibited and which are not." *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 758 (1976). The two subsections in point here are (d) and (j), which provide:

> "(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training."[25]
>
> • • •
>
> "(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may

[25] While subsection (d) is specifically directed to on-the-job training programs, subsections (a) and (c)(3), which are more general in coverage, may also be applicable here:

> "(a) It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."
>
> • • •
>
> "(c) It shall be an unlawful employment practice for a labor organization—
>
> • • •
>
> "(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

> exist with respect to the total number of percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

Section 703(d) standing alone does little to advance the inquiry since its operative words are "discriminate against any individual . . . in admission to . . . any [training] program," and "[t]he concept of discrimination is susceptible to varying interpretations." *Bakke, supra,* 46 LW at 4900 (opinion of Justice Powell). But § 703(d) does not stand alone. And, §§ 703(d) and (j), read together, state that Title VII, in prohibiting discrimination, does not *"require"* an employer or union to grant a racial preference to eliminate a racial imbalance. This articulation of Title VII's basic norm—an articulation which was arrived at through a "meticulous" drafting process in which the drafters "tried to be mindful of every word, of every comma, and of the shading of every phrase"[26]—strongly suggests that an employer or union is *permitted* to grant such a preference.

In contrast to §§ 703(d) and (j), § 601 of Title VI, the provision applicable in *Bakke,* states:

> "No person in the United States shall, on the ground of race, color, or national origin, *be excluded from participation in,* be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." (Emphasis added.)

[26] 110 Cong Rec. 11935 (Senator Dirksen, explaining the process by which the amendments in the Dirksen-Mansfield compromise, including § 703(j), were drafted). See also *infra,* pp. 57-58.

Relying on the portion of § 601 in italics, Mr. Justice Stevens' opinion in *Bakke* reasoned:

> "The University, through its special admissions policy, excluded Bakke from participation in its program of medical education because of his race. The University also acknowledges that it was, and still is, receiving federal financial assistance. The plain language of the statute therefore requires affirmance of the judgment below. A different result cannot be justified unless that language misstates the actual intent of the Congress that enacted the statute or the statute is not enforceable in a private action. Neither conclusion is warranted. • • • •
>
> "Petitioner contends, however, that exclusion of applicants on the basis of race does not violate Title VI if the exclusion carries with it no racial stigma. No such qualification or limitation of § 601's categorical prohibition of "exclusion" is justified by the statute or its history. The language of the entire section is perfectly clear; the words that follow "excluded from" do not modify or qualify the explicit outlawing of any exclusion on the stated grounds." (46 LW at 4934-35 (footnote omitted)).

The very different content of the basic prohibitions of Title VI and VII is not a mere happenstance; it reflects their different origins, different histories, and the different concerns addressed.

B. The 1964 Legislative History

1. The Genesis of the House Bill

Vass, *Title VII: Legislative History*, 7 Boston College Industrial and Commercial Law Review, 431, 433-436 (1966), succinctly states the background of Title VII:

> "At the outset of the Eighty-eighth Congress various Senators and Representatives submitted a plethora of civil rights bills. . . . [including] . . . H.R. 405 entitled 'A Bill to Prohibit Discrimination in Employment in Certain Cases Because of Race, Religion, Color, National Origin, Ancestry or Age' . . . the nominal ancestor of Title VII. It was introduced in the

> House by Mr. Roosevelt of California . . . was promptly referred to the House Committee on Education and Labor and [f]ollowing extensive hearings, . . . [was] reported . . . with amendments . . .
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> • • •
>
> ". . . [Thereafter] the administration's comprehensive bill on civil rights, H.R. 7152, was introduced in the House by Representative Celler of New York [and] . . . was promptly referred to the Committee on the Judiciary (and thence to Subcommittee No. 5). The bill as introduced contained no compulsory FEP provisions respecting private employment . . . During the Subcommittee hearings many witnesses, including George Meany, President of the AFL-CIO, Walter P. Reuther, President of the United Automobile Workers, AFL-CIO, and Sidney Zagri, legislative counsel for the International Brotherhood of Teamsters, testified in favor of such provisions. Mr. James Roosevelt of California, who was Chairman of the General Subcommittee on Labor of the House Committee on Education and Labor . . . testified as a co-sponsor of H.R. 7152 [in favor of] . . . amending H.R. 7152 by incorporating therein the provisions of H.R. 405, which . . . was pending in the Rules Committee. . . .
>
> "At the conclusion of the hearings the Subcommittee met in executive session. . . . As a result of its deliberations, H.R. 7152 was amended by striking out all after the enacting clause and inserting in lieu thereof an amendment in the nature of a substitute. . . . [which] included as Title VIII thereof the provisions of H.R. 405 as reported by the House Committee on Education and Labor. The full Judiciary Committee in turn also struck out all after the enacting clause in H.R. 7152 as recommended by its Subcommittee and adopted an amendment in the nature of a substitute. . . . [which] contained as Title VII thereof FEP provisions different in certain respects from those set forth in H.R. 405 and included in the bill recommended by Subcommittee No. 5.
>
> "H.R. 405, as reported by the House Committee on Education and Labor and included as Title VIII of H.R. 7152 as recommended by Subcommittee No. 5 provided for an administrative agency, comparable to the NLRB, with the authority to hold hearings and issue

cease-and-desist orders, enforceable in court, after a finding of discrimination in hiring or union membership....

". . . Title VII of the Judiciary version differed radically from the Education and Labor proposal in that the Judiciary version gave the Equal Employment Opportunity Commission no enforcement powers as such but simply the power to bring a civil action against the discriminator in the event a settlement by agreement could not be secured."

What did not change significantly in this evolution is the language of the basic prohibition as drafted in the initial Roosevelt bill. And, with two exceptions, the bill reported out by the House Judiciary Committee contained §§ 703 (a)-(d) as they were ultimately enacted. Those exceptions are the House floor amendments adding the prohibition against sex discrimination and adding coverage of "retraining, including on the job training." That bill did *not* contain § 703(j). Its enforcement procedure differed from the bill ultimately enacted in that it empowered the EEOC to institute lawsuits. Its remedial section (then numbered § 707 (e)), was identical to § 706(g) in the bill ultimately enacted, except for the final sentence of that section which was changed on the House floor.[27]

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[27] As reported out by the Judiciary Committee, the last sentence read:

"No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged *for cause*." H. Rep. No. 914, *supra*, p. 12 (§ 707(e)). (emphasis added)

As amended and ultimately enacted, that sentence provides:

"No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused employment or advancement or was suspended or discharged *for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a)*." § 706(g) (emphasis added).

2. The Judiciary Committee Report

The Judiciary Committee's Report simply described the provisions of Title VII without elaboration, and thus contained no discussion of the bill's treatment of quotas. However, the opponents of the bill on the Committee, in their Minority Report, contended that the bill would empower the federal government to force employers and unions to adopt quotas to "racially balance" their workforces and memberships. The Minority's analysis began with this preliminary observation, which was italicized in the Report:

"Throughout this entire report the construction we have placed upon the provisions of the reported bill are based upon what we believe will be advanced by the administration, evidenced by numerous Executive orders, other administrative actions and statements of officials in the executive branch of the Federal Government. We do not mean to say that such construction is necessarily correct or that the powers granted are constitutional. Broad, obscure, and undefined wording is repeatedly used in the bill."[28]

The Minority Report asserted that the Department of Labor had been demanding racial balancing in apprenticeship programs, and that "the administration intends to rely upon its own construction of 'discrimination' as including the lack of racial balance . . ."[29] The Minority Report then proceeded to list "examples" of the effects which passage of the bill would have:

"Under the power conferred by this bill, [the farmer] may be forced to hire according to race, to 'racially

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[28] H.R. Rep. No. 914, 88th Cong. 1st Sess. 64 (1963) (hereinafter "H. Rep.").

[29] *Id.* at 68.

balance' those who work for him in every job classification or be in violation of Federal law."[30]

• • •

"[If a] union roster did not contain the names of the carpenters of the race needed to 'racially balance' the job, the union agent must, then, go into the street and recruit members of the stipulated race in sufficient number to comply with Federal orders, else his local could be held in violation of Federal law."[31]

• • •

"[I]f a contractor, for example, has been adjudged guilty of discrimination [he] must, therefore, hire 100 or 1,000 workers of a given race—in preference to all others—[until] his job becomes racially balanced . . ."[32]

• • •

"If [an employer's] firm is not 'racially balanced,' . . . he has no choice, he must employ the person of that race which, by ratio, is next up, even though he is certain in his own mind that the [person] he is not allowed to employ would be a superior employee."[33]

• • •

"If a job applicant can write and there is an opening and he is of the race called for to balance the make-up of the staff, that person must be employed in preference to someone of another race."[34]

From the cited examples, the Minority Report drew these conclusions:

"That such mandatory provisions of law approach the ludicrous should be apparent. That this is, in fact, a not too subtle system of racism-in-reverse cannot be successfully denied."[35]

These contentions in the Minority Report led the Republican sponsors of the bill on the Judiciary Committee, who

[30] *Id.* at 69 (italics omitted).

[31] *Id.* at 71.

[32] *Id.* at 72.

[33] *Id.* at 72-73.

[34] *Id.* at 73.

[35] *Id.* at 73.

were to play a critical role throughout the legislative process, to state the following in their "Additional Views":[36]

"It must also be stressed that the [Equal Employment Opportunity] Commission must confine its activities to correcting abuse, not promoting equality with mathetical certainty. In this regard, nothing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions. Similarly, management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor unions must not be interfered with except to the limited extent that correction is required in discrimination practices. Its primary task is to make certain that the channels of employment are open to persons regardless of their race and that jobs in companies or membership in unions are strictly filled on the basis of qualification."[37]

3. The House Floor Debate

When the bill reached the House floor, the opening speech in support of its passage was delivered by Representative Celler, the Chairman of the House Judiciary Committee. A portion of that speech was devoted to answering the "unfair and unreasonable criticism" which had been leveled at the bill:[38]

"It has been claimed that the bill would deprive employers, workers, and union members of their right to be free to control their business affairs and their membership. Specifically, the charge has been made that the Equal Employment Opportunity Commission to be established by Title VII of the bill would have the power to prevent a business from employing and promoting the people it wished, and that a 'federal

[36] The signers of these Additional Views were Representatives McCulloch, Lindsay, Cahill, Shriver, MacGregor, Mathias and Bromwell.

[37] *Id.* at 150.

[38] 110 Cong. Rec. 1518.

inspector' could order the hiring and promotion only of employees of certain races or religious groups. This description of the bill is entirely wrong. The Equal Employment Opportunity Commission would be empowered merely to investigate specific charges of discrimination and to attempt to mediate or conciliate the dispute. It would have no authority to issue any orders to anyone.

"In the event that wholly voluntary settlement proves to be impossible, the Commission could seek redress in the federal courts, but it would be required to prove in the court that the particular employer involved had in fact, discriminated against one or more of his employees because of race, religion or national origin. The employer would have ample opportunity to disprove any of the charges involved and would have the benefit of the protection of all the usual judicial procedures.

"No order could be entered against an employer except by a court, and after a full and fair hearing, and any such order would be subject to appeal as is true in all court cases.

"*Even then, the court could not order that any preference be given to any particular race, religion or other group but would be limited to ordering an end to discrimination.* The statement that a federal inspector could order the employment and promotion only of members of a specific racial or religious group is therefore patently erroneous . . .

• • •

"It is likewise not true that the Equal Employment Opportunity Commission would have power to rectify existing 'racial or religious imbalance' in employment by *requiring* the hiring of certain people without regard to their qualifications simply because they are of a given race or religion. Only actual discrimination could be stopped." [39]

Representative Lindsay, one of the authors of the "Additional Views" in the Report, said:

"This legislation . . . does not, as has been suggested

[39] 110 Cong. Rec. 1518 (emphasis added).

here—both on and off the floor—force acceptance of people in . . . jobs . . . because they are Negro. It does not impose quotas or any special privileges . . . There is nothing whatever in this bill about racial balance as appears so frequently in the Minority Report of the Committee.

"What the bill does do is prohibit discrimination because of race or religion . . .

"Everything in this proposed legislation has to do with providing a body of law which will surround and protect the individual from some power complex. This bill is designed for the protection of individuals. When an individual is wronged he can invoke the protection to himself . . ." [40]

Representative Minish, a supporter, added:

"Under Title VII, employment will be on the basis of merit, not race. This means that no quota system will be set up, no one will be forced to hire incompetent help because of race or religion, and no one will be given a vested right to demand employment for a certain job. The Title is designed to utilize to the fullest our potential work force, to permit every worker to hold the best job for which he is qualified. This can be done by removing the hurdles that have too long been placed in the path of minority groups who seek to realize their rights and to contribute to a full society." [41]

A number of opponents then repeated the theme of the Minority Report, that Title VII would require employers and unions to engage in racial balancing. As Representative Alger put it, Title VII attempts to "enforce preferential treatment for the Negro by making jobs available to him for which he is not qualified because of injustices practiced upon his forebears." [42]

Representative Healey, a supporter, replied:

"Opponents of the bill say that it sets up racial

[40] 110 Cong. Rec. 1540.

[41] 110 Cong. Rec. 1600.

[42] 110 Cong. Rec. 1645; see also, 110 Cong. Rec. 1620 (Roberts); 1633 (Dowdy).

> quotas for job[s] . . . The bill does not do that. It simply requires . . . that industries involved in interstate commerce not deny a qualified person the right to work because of his race or religion."[43]

Representatives Dowdy and Ashmore renewed the contention that Title VII would require racial balancing.[44] Representative Goodell interjected:

> "As I understand the gentleman's position, I do not think it can go unchallenged. There is nothing here as a matter of legislative history that would require racial balancing . . . We are not talking about a union having to balance its membership or an employer having to balance the number of employees. There is no quota involved. It is a matter of an individual's rights having been violated, charges having been brought, investigation carried out and conciliation having been attempted and then proof in court that there was discrimination and denial of rights on the basis of race or color."[45]

With no further discussions of quotas, the House passed the entire bill, including Title VII, and sent it to the Senate. Subsequently, the Republican sponsors in the House prepared a memorandum describing the bill as passed. In pertinent part, that memorandum stated:

> "The Civil Rights Bill, as passed by the House, does not in any way *require, reward,* or *encourage:* (1) 'open occupancy' in private housing, (2) the transfer of students away from the neighborhood schools to create 'racial balance', or (3) the imposition of racial quotas or preferences in either private or public employment of individuals.
>
> • • •
>
> "*Upon conclusion of the trial,* the federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. But, *Title VII does not permit the ordering of racial quotas* in businesses or unions and does not permit interferences with seniority rights of employees or union members."[46]

[43] 110 Cong. Rec. 1994.

[44] 110 Cong. Rec. 2557 (Dowdy); 2558 (Ashmore).

[45] 110 Cong. Rec. 2558.

This memorandum drew two conclusions as to the meaning of Title VII: Title VII did not "permit" court-ordered quotas, and it did not "require, reward, or encourage" privately adopted quotas. No sponsor in the House had said anything inconsistent with either proposition. A copy of this memorandum was transmitted to Senator Kuchel, the Republican manager of the bill in the Senate, who introduced it at the close of his opening speech in support of the bill in the Senate (see p. 41, *infra*).

4. The Senate

The Senate, after lengthy debate, decided to take up the bill directly, without referring it to a Committee, and consequently there is no Committee Report in the Senate.

a. The Debate on Taking Up the Bill.

During the 17-day debate over whether the bill should be sent to Committee, Senator Hill made a lengthy speech attacking Title VII. A major theme of that speech was that the bill would install quota systems throughout American employment.[47] This theme was elaborated by Senator Robertson:

> "An employer will not be free to make selection as to individuals he prefers to hire. This Title suggests that hiring should be done on some percentage basis in order that racial imbalance will be overcome. It is contemplated by this Title that the percentage of colored and white population in a community shall be in similar percentages in every business establishment that employs over 25 persons. Thus, if there were 10,000 colored persons in a city, and 15,000 whites, an employer with 25, would, in order to overcome racial imbalance, be required to have 10 colored personnel and 15 white. And if by chance that employer had 20

[46] *Id.* at 6565-66 (emphasis added).

[47] *Id.* at 4761, 4764, 4767.

> colored employees, he would have to fire 10 of them in order to ractify the situation. Of course, this works the other way around where whites would be fired. The impracticability and unworkability of this Title seems self-evident."[48]

Senator Humphrey responded:

> "The bill does not require that at all. If it did, I would vote against it . . . [V]oluntary compliance procedures must be used. There is no percentage quota."[49]

Later that day, Senator Humphrey introduced a newspaper article quoting the answers of a Justice Department "expert" to the "ten most common objections to Title VII." In material part, it stated:

> "Objection: The law would empower federal 'inspectors' to require employers to hire by race. White people would be fired to make room for Negroes. Seniority rights would be destroyed. . . .
>
> "Reply: The bill requires no such thing. The five-member Equal Employment Opportunity Commission that would be created would have no powers to order anything. It can seek voluntary compliance with the objective of nondiscrimination in hiring.
>
> "If compliance is not forthcoming, the Commission may take its case to a federal judge, leaving it to him to decide if a violation did in fact take place and what the remedy should be. The bill would not authorize anyone to order hiring or firing to achieve racial or religious balance. An employer will remain wholly free to hire on the basis of his needs and of the job candidate's qualifications. What is prohibited is the refusal to hire someone because of race or religion. Similarly, the law will have no effect on union seniority rights."[50]

On March 17, responding to a political advertisement charging that the bill would give the federal government the power to run America's businesses, Senator Humphrey, on the floor of the Senate, stated:

[48] *Id.* at 5092.

[49] *Id.* at 5092.

[50] *Id.* at 5094.

> "Title VII . . . will prohibit discrimination in employment . . . It does not limit the employer's freedom to hire, fire, promote, or demote for any reason—or no reason—so long as his action is not based on race, color, religion, national origin or sex. It does not interfere with job seniority; nor does it in any way authorize the federal government to prescribe, as the advertisement charges, a 'racial balance' of job classifications or office staffs or 'preferential treatment of minorities'.
>
> • • •
>
> [N]othing in the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group."[51]

On March 23, answering a charge by Senator Smathers that Title VII would lead to employment quotas, Senator Humphrey declared:

> "There is no enforced quota. The quota system which has been discussed is nonsense. Everyone knows that it is not in the bill, and that where there are State FEPC laws, it is not the pattern.
>
> "There would be no Attorney General referred to in the bill with the powers of the Federal Government to smack down some poor, unsuspecting employer . . . The only thing that the court would do would be to ask the defendant to cease and desist, to tell him to stop this practice, if it can be proved that the practice has been unlawful."[52]

b. The Debate on the House Bill.

On March 26, 1964, after 17 days of debate, the Senate voted to reject the motion to refer the bill to Committee,[53] and on March 30, the formal debate on the bill began. Senators Humphrey and Kuchel, the co-managers of the entire

[51] *Id.* at 5423.

[52] *Id.* at 6001. Senator Smathers then secured Senator Humphrey's acknowledgement that under the bill an employer would have to obey a court order requiring him "to take affirmative action, including reinstatement of employees." *Ibid.*

[53] *Id.* at 6455.

Civil Rights bill in the Senate, undertook "to lay the affirmative case for the bill before the Senate."[54] Senator Humhprey began his discussion of Title VII by declaring:

> "At the present time Negroes and members of other minority groups do not have an equal chance to be hired, to be promoted, and to be given the most desirable assignment. They are treated unequally in some labor unions and are discriminated against by many employment agencies.
>
> "No civil rights legislation would be complete unless it dealt with this problem. Fair treatment in employment is as important as any other area of civil rights."[55]

Senator Humphrey then presented an extensive brief on the economic consequences—in terms of underemployment and lower wages—suffered by blacks "in every part of the country."[56] He cited statistics showing that "the relative position of the Negro worker is steadily worsening."[57] He saw this not as a sign that "prejudice is increasing," but rather as a reflection of automation's "gradually doing away with the unskilled and semi-skilled jobs which have been traditionally open to Negroes, while the Negro is being excluded, both by lack of training and by discrimination, from the new jobs which are being created."[58]

Senator Humphrey detailed the manner in which discrimination claims could be processed through suit and finding of discrimination, and then described the remedies available to a court:

> "The relief sought in such a suit would be an injunction against future acts or practices of discrimination, but the Court could order appropriate affirmative relief, such as hiring or reinstatement of employees

[54] *Id.* at 6528.

[55] *Id.* at 6547.

[56] *Id.* at 6547.

[57] *Id.* at 6547.

[58] *Id.* at 6548.

> and payment of backpay. This relief is similar to that available under the National Labor Relations Act in connection with the unfair labor practices, 29 United States Code 160(b). *No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title.* This is stated expressly in the last sentence of Section 707(e) [enacted, without change, as §706(g)] which makes clear what is implicit throughout the whole title; namely, that employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that *individuals* may not be discriminated against because of race, religion, sex or national origin.
>
> • • •
>
> *"Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance.*
>
> "That bugaboo has been brought up a dozen times; but it is nonexistent. In fact, the very opposite is true. Title VII prohibits discrimination. In effect, it says that race, religion and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion.
>
> "In Title VII we seek to prevent discriminatory hiring practices. We seek to give people an opportunity to be hired on the basis of merit, and to release the tremendous talents of the American people, rather than to keep their talents buried under prejudice or discrimination."[59]

At the close of his speech, after describing the other titles of the bill, Senator Humphrey returned briefly to the subject of employment quotas:

> "It is claimed that the bill would require racial

[59] *Id.* at 6548 (emphasis added).

quotas for all hiring, when in fact it provides that race shall not be a basis for making personnel decisions.

"As I have said, the bill has a simple purpose. That purpose is to give fellow citizens—Negroes—the same rights and opportunities that white people take for granted."[60]

Senator Kuchel made the other major opening speech in support of the bill. He, too, took pains to demonstrate that the remedial provisions would not permit court-ordered quotas:

"If the court finds that unlawful employment practices have indeed been committed as charged, then the court may enjoin the responsible party from engaging in such practices and shall order the party to take that affirmative action, such as the reinstatement or hiring of employees, with or without backpay, which may be appropriate.

• • •

"Title VII might justly be described as a modest step forward. Yet it is pictured by its opponents and detractors as an intrusion of numerous Federal inspectors into our economic life. These inspectors would presumably dictate to labor unions and their members with regard to job seniority, seniority in apprenticeship programs, racial balance in job classifications, racial balance in membership, and preferential advancement for members of so-called minority groups. Nothing could be further from the truth. I have noted that the Equal Employment Opportunity Commission is empowered merely to investigate specific charges of discrimination and attempt to mediate or conciliate the dispute. It would have no authority to issue orders to anyone. Only a Federal court could do that, and only after it had been established in that court that discrimination because of race, religion, or national origin had in fact occurred. Any order issued by the Federal district court would, of course, be subject to appeal. *But the important point, in response to the scare charges which have been widely circulated to local unions throughout America, is that the Court cannot order preferential hiring or promotion consideration for any particular race, religion, or other group. Its power is solely limited to ordering an end to the discrimination which is in fact occurring.*"[61]

[60] *Id.* at 6553.

At the close of his speech, Senator Kuchel introduced the memorandum prepared by the Republican sponsors in the House, describing the bill as enacted by the House, which we have quoted earlier, *supra*, pp. 34-35. (That memorandum declared that Title VII does not "in any way require, reward, or encourage" the private adoption of employment quotas, and does not "permit" employment quotas to be ordered by courts.)[62]

Each of the next several days was devoted to the sponsors' exposition of a particular title of the bill. On April 8, 1964, the speeches in support of Title VII were made by Senators Clark and Case, the bipartisan "captains" for Title VII.

Senator Clark began his speech by explaining the peculiar

[61] *Id.* at 6563 (emphasis added). Later in the same speech, addressing the impact of Title VII upon seniority, Senator Kuchel made the following statement:

"Neither would seniority rights be affected by this Act. Employers and labor organizations could not discriminate in favor of or against a person because of his race, his religion, or his national origin. In such matters, the Constitution, and the bill now before us drawn to conform to the Constitution, is color blind."

Id. at 6564. This is the *only* reference we have found, throughout the lengthy debates in both Houses, suggesting that Title VII was "drawn to conform to the Constitution." In light of the innumerable statements of other sponsors that Title VII was predicated exclusively upon the Commerce Clause, we do not believe it would be proper here—as a majority of the Court found it to be with respect to Title VI in *Bakke*—to draw the meaning of Title VII from either the Fifth and Fourteenth Amendments or Congress' contemporaneous understanding of those Amendments. See *supra*, p. 17.

[62] *Id.* at 6565-66.

parliamentary posture in which the Senate found itself. The Senate could not afford to amend the House bill unless it knew in advance that the House would concur in every amendment. For a vote of non-concurrence by the House would expose the Senate to a second filibuster—and it was going to be hard enough to invoke cloture once. This meant that the Senate "dare not" make any changes that Representative McCulloch—the principal Republican sponsor in the House—would not approve. Representative McCulloch was "to some extent the . . . 'czar' of the Senate, since we are in a parliamentary situation where we do not dare adopt any amendment which has not received the categorical approval of Representative McCulloch." (Representative McCulloch, as the principal Republican sponsor in the House, was the first signer of the "Additional Views" in the House Report, *supra*, pp. 30-31, and of the memorandum quoted *supra*, pp. 34-35.) Accordingly, while Senator Dirksen wanted amendments to Title VII, some of which were acceptable to Clark, the sponsors would have to clear them with the House before considering their adoption.[63]

Senator Clark then turned to the need for Title VII, and presented a brief, similar to Senator Humphrey's nine days before, on the economic plight of America's blacks.[64] The only statement about quotas made by Senator Clark in his speech was the following:

> "The suggestion that racial balance or quota systems would be imposed by this proposed legislation is entirely inaccurate."[65]

But a series of written materials he introduced, designed to answer some of the erroneous charges about the bill, went further. A Justice Department letter, answering Senator Hill's charge that Title VII "would impose the requirement of racial balance," declared:

[63] *Id.* at 7203, 7215.

[64] *Id.* at 7204-05.

[65] *Id.* at 7207.

> "There is no provision, either in title VII or in any other part of the bill, that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance . . . On the contrary, any deliberate attempt to maintain a given balance would almost certainly run afoul of Title VII because it would involve a failure or refusal to hire some individual because of his race, color, religion, sex, or national origin. What Title VII seeks to accomplish, what the civil rights bill seeks to accomplish is equal treatment for all."[66]

Senator Clark also introduced an interpretative memorandum for himself and Senator Case, which stated:

> "There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race."[67]

Finally, Senator Clark introduced written answers which he had prepared to certain "objections" which had been voiced to Title VII. Two items in this document were:

> "Objection: Many employers will lean over backwards to avoid discrimination, and as a result will discriminate against other employees, thereby increasing case volume.
>
> "Answer: . . . [T]he Commission has a clear mandate to engage in widespread educational and promotional activities to encourage understanding and acceptance of the policy of the act, including the obligation not to discriminate against whites.
>
> • • •
>
> "Objection: The bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area.

[66] *Id.* at 7207.

[67] *Id.* at 7213.

"Answer: Quotas are themselves discriminatory."[68]

Senator Case, who made the other major speech on April 8, in support of Title VII, did not allude in terms to the quota issue. In describing the features of the bill, he did, however, provide this description of what eventually became the last sentence of § 706(g):

> "No order of the court under this title may require the . . . hiring . . . or promotion of an individual . . . if the individual was . . . refused employment or advancement . . . for any reason other than the discrimination prohibited by this title."[69]

Senator Ervin asked:

> "The bill is designed to compel employers to hire nonwhites in specific cases . . . is it not?"[70]

Senator Case responded:

> "The bill would do only one thing. It would make it unlawful for a person to discriminate against an individual in regard to employment—hiring, firing, promotion, or any other matter—because of race. It does not require anybody to hire a particular individual."[71]

On April 9, 1964, the sponsors having completed their presentation of the bill, the opponents gained the floor and the filibuster was under way. Senator Robertson made the first speech for the opponents. At one point, he described the advice he had given to a businessman who was his constituent: "you could be required to have a certain percentage of . . . Negroes among the employees in your business, once title VII was enacted into law."[72] This statement triggered the following colloquy:

"MR. HUMPHREY: I feel sure that the Senator

[68] *Id.* at 7218.

[69] *Id.* at 7243.

[70] *Id.* at 7253.

[71] *Id.* at 7253.

[72] *Id.* at 7418.

from Virginia is not going to suggest or intimate that under this title of the bill there would be such a thing as a quota or a required percentage.

"MR. ROBERTSON: Not only am I going to intimate it, I am going to charge it; and I am also going to point it out in detail.

"MR. HUMPHREY: Does the Senator from Virginia say that clearly would be required by this part of the bill?

"MR. ROBERTSON: I told that businessman it would be possible, and if it would be possible, such a provision should not be included.

"MR. HUMPHREY: But can the Senator from Virginia point out in title VII any section or subsection or provision that would indicate that in connection with the elimination of segregation in employment based on color, race, religion or national origin an employer would be required to hire any member of a certain ethnic group?

"MR. ROBERTSON: What does 'discrimination' mean? If it means what I think it does, and which it could mean, it means that a man could be required to have a quota or he would be discriminating. The question comes down to what is meant by 'discrimination' and the framers of the bill will not tell us.

"In the debate in the House it was frankly admitted that quotas were possible under the very definition of what is 'discrimination.'

• • •

"MR. HUMPHREY: Can the Senator point out any place in the language of the bill that calls for quotas or a percentage of employees based upon race, creed, color, or national origin? The Senator can say 'Yes' but what is 'discrimination'? It is like my asking the Senator about atomic energy, and he replies 'yes, but how about ice cream cones?' Really, it is a non sequitur. The Senator is a man of logic and reason. I ask him a simple question, We will get around to a definition of 'discrimination.' But what about percentages and quotas?

"MR. ROBERTSON: The bill has been framed by

some very clever lawyers. They were so clever that they even fooled my distinguished friend from Minnesota . . .

• • •

"MR. HUMPHREY: I would like to make an offer to [the Senator]. If the Senator can find in title VII . . . any language which provides that an employer will have to hire on the basis of percentage or quota related to color, race, religion, or national origin, I will start eating the pages one after another, because it is not in there.

"MR. ROBERTSON: . . . [I]t is proposed to write some vague language in this title VII and the Senator asks, 'Where do you find quotas in it?' I find it in the possible ruling of a bureaucrat and then confirmed by a court that does not operate in a way that I approve."[73]

Each day during the Senate debates on the Civil Rights bill, the principal Senate sponsors prepared a Bipartisan Civil Rights Newsletter which was hand-delivered to the office of each Senator supporting the bill. Its purpose, as explained by Senator Humphrey, was "to keep Senators who are in favor of civil rights legislation informed of our point of view."[74] It is apparent from the numerous references to the Newsletter during the debates that it was widely read by Senators.[75] The April 11, 1964 issue of the Newsletter, two days after the Humphrey-Robertson dialogue, contained a "brief description of Title VII," which included the following:

"Under title VII, not even a Court, much less the

[73] *Id.* at 7418-20.

[74] *Id.* at 5042.

[75] The initiation of the Newsletter caused a minor controversy among supporters and opponents of the bill, reflected in the colloquy between Senators Stennis, Humphrey and Javits, *id.* at 5042, 5044. The Newsletter remained a popular item, see *id.* 5046 (Humphrey); 5079 (Humphrey); 7474 (Humphrey); 8369 (Bayh); 8912 (Williams); 9105 (Clark); 9870 (Case); 10622 (Humphrey); 12210 (Humphrey); 14464 (Hart).

Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title."[76]

On April 13, Senator Smathers, in the course of a lengthy speech, declared that Title VII "would lead to a quota system eventually."[77] The following ensued:

"MR. HUMPHREY: Will the Senator name one state in which there is a quota system under FEPC?

"MR. SMATHERS: There has not been one yet, but that is what is being aimed at . . . [An employer] will protect himself by hiring a certain number of colored people in order to keep the majesty and might of the Federal law and its large bureaucracy off his neck.

• • •

"MR. HUMPHREY: Would the Senator from Florida be more pleased if we included in the bill an amendment which provided that there should be no quota system?

"MR. SMATHERS: I think the bill would be improved.

"MR. HUMPHREY: That might be a good Amendment. It is only to satisfy those who are doubters, because if we do not expressly provide for a quota system, obviously it will not be included. But since we do provide in other sections of the bill—for example, in title VI—that the withdrawal of Federal funds should not relate to insured activities or guarantees, we might very well want to include that sort of restraint in the bill.

"I have heard this argument made again and again. If there is that legitimate fear, which I do not see in the bill, but which others may see, perhaps we ought to remedy the alleged defect. I do not believe in a quota system."[78]

[76] *Id.* at 14465.

[77] *Id.* at 7800.

[78] *Id.* at 7800.

On April 16, Senator Dirksen announced that his "principal interest" was "in title II [public accommodations] and in title VII," which he felt required amendment.[79] These were the only two titles of the bill aimed directly at private enterprise.

On April 20, Senator Smathers, in the course of a lengthy speech, repeated his expectation that an employer "in order to keep the weight of the Federal Government off his neck and keep himself out of court, . . . must finally establish a sort of quota system to protect himself at all times, so that he will not have to spend all his time and resources in court proving that he does not discriminate."[80] The following colloquy ensued:

> "MR. ALLOTT: How does the Senator interpret [Title] VII in terms of the fact that an employer would have to live up to a quota? I completely agree with the Senator that if an employer were *required* to employ a person on the basis of a quota, there would be no justification for that procedure under the American system. If people *must* be employed on the basis of a percentage, there is no basis for such a procedure under the American system of free enterprise.
>
> "Where in the bill does the Senator find justification for the statement that persons would have to be employed on the basis of a quota or percentage? I will pick up the bill and follow through with him, if the Senator wishes.
>
> "MR. SMATHERS: It is not written in the bill that there must be a quota system, but the net effect of the adoption of the proposed law would be that employers, in order to keep themselves from being charged with having discriminated, would, in time, have certain people working for them to meet the color qualifications, the religious qualifications, the creed qualifications, and so on.
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> • • •

[79] *Id.* at 8195.

[80] *Id.* at 8500.

> "The bill does not contain any provision about a quota system. As a matter of fact, the other day the Senator from Minnesota said that he was so much against the quota system that, if it would help the Senator from Florida, he would be for a provision in the bill against quotas, as I recall. I believe it would be helpful to have such a provision in the bill.
>
> "But what is going to happen? . . . I am saying to the Senator from Colorado that that will be the result, although I agree that the bill does not provide for it.
>
> • • •
>
> "MR. ALLOTT: I am happy to learn that the Senator agrees that the bill does not provide for it.
>
> • • •
>
> "The only point I wish to make is that if anyone sees in the bill quotas or percentages, he must read that language into it. It is not in the bill.
>
> "I do not contend that any man should be employed because of his race, his religion, his color, or his ethnic origin; but there is nothing in the bill, unless one reads into the language a right that is not there, which provides that one *must* employ a man because of his race, color, religion, or national origin. If the Senator finds in the bill language to the effect that an employer must do that, I shall be very much interested to learn about it.
>
> "MR. SMATHERS: As I said earlier I do not contend that the bill provides that there *shall* be a quota system or percentages. In some instances I believe the bill avoids what might be unfortunate consequences."[81]

On April 21, Senator Sparkman, in the course of a lengthy speech, declared that Title VII would require employers to "employ a certain percentage of Puerto Ricans."[82] Senator Keating interrupted:

> "Have not the Senator from Alabama and the Sen-

[81] *Id.* at 8500-01 (emphasis added). Senator Allott was one of the Republican sponsors.

[82] *Id.* at 8618.

ator from Mississippi already stated that the bill does not provide in any way for quotas of any kind?'' [83]

Senator Sparkman replied:

> ''Yes . . . The bill does not provide for quotas. But most likely, as the agents of the Equal Employment Opportunity Commission contact employers, questions will arise.'' [84]

Senator Sparkman explained that these agents would point to the underrepresentation of minorities as potential evidence of discrimination, and would say that the employer ''ought'' to have the requisite percentage. Thus, in practice,

> ''almost invariably there would be a movement toward a kind of quota system. Such a tendency has already been observed under the President's voluntary employment opportunities program. Employers have been threatened with the loss of their government contracts if they did not comply.'' [85]

To which Senator Keating responded:

> ''Of course, improper administration of the law is a question that may be encountered at any time. I was speaking about the provisions of the bill.'' [86]

Senator Sparkman replied: ''The Senator is correct.'' [87]

Senator Keating then asked:

> ''Is the Senator aware that despite his assertion, and despite the recognition that quotas are not provided in the bill, literature is going out all over the

[83] *Id.* at 8618. We have been unable to locate acknowledgments by an Alabama or Mississippi Senator to this effect, but Senator Smathers had done so (*supra*, p. 49) and it would not be surprising if other opponents had made similar acknowledgments off the floor of the Senate.

[84] *Id.* at 8618.

[85] *Id.* at 8618.

[86] *Id.* at 8618.

[87] *Id.* at 8618.

> country representing that the bill lays down quotas for employers?'' [88]

Senator Sparkman had not seen such literature, but he reiterated that *in practice* the bill would lead to quotas:

> ''For example, I was referring to what was done in the Post Office Department. I was going by what was done under the President's voluntary advisory program on equal employment opportunities. The Senator knows the program of which I speak. I was going by the recommendations that the Civil Rights Commission has made.
>
> ''So I say that in practical application the procedure would not be called a quota system, but it would represent virtually that to me. Certainly the suggestion will be made to a small business that may have a small Government contract—perhaps $25,000 or $30,000 Government contract—that if it does not carry out the suggestion that has been made to the company by an inspector, its Government contract will not be renewed. It will not get another contract.
>
> • • •
>
> ''. . . That is the reason I have said that when it comes to the practical application of the program, even though quotas are not required, some kind of quota system will be used.'' [89]

On April 23, Senator Williams of New Jersey, a supporter of the bill, gained the floor during the ''morning hour'' and responded to a number of political advertisements charging, *inter alia*, that the bill would require quotas:

> ''Mr. President it is also charged that employers, including farmers, will have to hire employees according to race to establish racial balance in every job classification; and it is said that quotas will be imposed,

[88] *Id.* at 8618. Senator Keating was a Republican sponsor. He was one of the principal advocates of the provision in Title IV of the bill permitting (but not requiring) racial balancing by local school authorities (*infra*, p. 67).

[89] *Id.* at 8618-19.

forcing businessmen to hire incompetent and unqualified personnel.

"Now I turn to the fact: For some reason the fact that there is nothing whatever in the bill which provides for racial balance or quotas in employment has not been understood by those opposed to civil rights legislation. They persist in opposing a provision which is not only not contained in the bill, but is specifically excluded from it. Those opposed to H.R. 7152 should realize that to hire a Negro solely because he is a Negro is racial discrimination, just as much as a 'white only' employment policy. Both forms of discrimination are prohibited by title VII of this bill. The language of that title simply states that race is not a qualification for employment. Every man must be judged according to his ability. In that respect, all men are to have an equal opportunity to be considered for a particular job. Some people charge that H.R. 7152 favors the Negro, at the expense of the white majority. But how can the language of equality favor one race or one religion over another? Equality can have only one meaning, and that meaning is self-evident to reasonable men. Those who say that equality means favoritism do violence to common sense.

• • •

"Finally, let me attempt to put to rest the wholly spurious argument that H.R. 7152 would establish compulsory employment quotas, by pointing out certain relevant facts which should demonstrate the baseless nature of this objection to the bill. The Supreme Court has ruled, in numerous cases, that racial discrimination in the selection of juries is unconstitutional. In case after case, where it has been demonstrated that Negroes have been systematically excluded from serving on juries, the Supreme Court has declared such practice a violation of constitutional procedure. No individual may be prevented from serving on a jury on account of his race. But this does not mean that every jury must contain a Negro. The Court's decision does not establish quotas for juries. Neither does the Court demand that prospective Negro jurors be given preferential treatment over prospective white jurors when a panel is chosen. In fact, the Supreme Court has flatly rejected the notion that there must be racial quotas

for juries. In *Akins* v. *Texas*, 325 U.S. 398 (1945), the Court ruled that there need not be any direct correlation between the number of Negroes on a particular jury and the number of Negroes in the community.

"What is true in the case of juries is also true in the area of employment. H.R. 7152 does not require that every employer with more than 25 employees hire a Negro or a certain percentage of Negroes. It is possible that although a particular jury or a particular business will contain no Negroes, no charge of discrimination will be made. But businesses, like juries, may not systematically exclude Negroes, when the only ground for exclusion is the color of a man's skin.

"So I think the experience with juries is on all fours with what will be the situation in the case of employment. In practice, I know this is true in New Jersey, which I am so proud to represent. No quotas are applied there.

"There is an absolute absence of discrimination for anyone; and there is an absolute prohibition against discrimination against anyone."[90]

On April 25, Senator Keating took the floor during the "morning hour" to respond to a public advertisement charging that the bill would require quotas:

"The coordinating committee has charged . . . that Title VII would . . . permit the Government to impose quotas and preferences upon employers and labor organizations in favor of minority groups . . .

"Title VII does not grant this authority to the Federal Government. To make such assertions, as the coordinating committee does, is not only an unfortunate misinterpretation of the title's operation but is a cruel hoax because it generates unwarranted fear among those individuals who must rely upon their job or union membership to maintain their existence. . . .

"An employer or labor organization must first be found to have practiced discrimination before a court can issue an order to prohibit further acts of discrim-

[90] *Id.* at 8921.

> ination in the first instance. Adequate administrative and judicial procedures have been provided in the title to assure that an order of court is only founded upon clear and conclusive evidence of discrimination. For the Commission to request or a court to order preferential treatment to a particular minority group would clearly be inconsistent with the guarantees of the Constitution."[91]

On May 4, Senator Allott proposed an amendment which would preclude courts from finding a violation "solely on the basis of evidence that an imbalance exists with respect to . . . race, color, religion, sex, or national origin . . ."[92] Senator Allott explained the purpose of his amendment:

> "Mr. President, I have heard over and over again in the last few weeks the charge that title VII, the equal employment opportunity section, would impose a quota system on employers and labor unions. There are two variations of the argument. One is that because title IV specifically says that 'desegregation' shall not mean assignment of students to public schools in order to overcome racial imbalance, and title VII contains no such disclaimer in relation to employment practices, then it follows that title VII is intended to require hiring to overcome racial imbalance in the workforce. The other variation is that an employer will hire members of minority groups, regardless of their qualifications, to avoid having any problems with the Equal Employment Opportunity Commission. The result, either way, so the argument goes, is that a quota system will be imposed, with employers hiring and unions accepting members, on the basis of the percentage of population represented by each specific minority group.
>
> "I do not agree with the argument. The junior Senator from Florida [Mr. SMATHERS] and I discussed this for the record one evening here on the Senate floor, and I believe I made it clear at that time that I do not believe Title VII would result in imposition of a quota system. Further, I believe that a quota

[91] *Id.* at 9113.

[92] *Id.* at 9881-82.

> system of hiring would be a terrible mistake, not only from the viewpoint of the employer, but from the viewpoint of the employee—from the viewpoint of the minority as well as the majority. Basically, I believe that the color of a man's skin, or the faith to which he adheres, should be completely extraneous considerations when an employer hires or a labor union admits to membership—just as it should be extraneous in granting the right to vote or in assigning him to a school.
>
> "But the argument has been made, and I know that employers are also concerned with the argument. I have, therefore, prepared an amendment which I believe makes it clear that no quota system will be imposed if title VII becomes law. Very briefly, it provides that no finding of unlawful employment practice may be made solely on the basis of racial imbalance."[93]

On May 8, Senator Carlson introduced an explanatory statement about the bill, which provided, in pertinent part:

> "Should voluntary efforts fail, the Commission could bring suit in the Federal courts and would have the burden of proving discrimination. Individual suits could be brought only if the Commission failed to sue and, even then, only if one member of the Commission gave his written consent. There would be no authority to *require* quota hiring to achieve racial balance or to order firing of whites to create jobs for Negroes. Union seniority would not be affected and employers would remain wholly free to hire or fire on the basis of job qualifications."[94]

On May 20, Senator Javits took the floor to respond to charges contained in a campaign speech by Governor George Wallace. Governor Wallace had said:

> "An employer can lose his right to hire whomever he might choose—the power being vested in a federal inspector who, under an allegation of racial imbalance

[93] *Id.* at 9881.

[94] *Id.* at 10520 (emphasis added). Senator Carlson was one of the Republican supporters.

or religious imbalance, can establish a quota system whereby a certain percentage of a certain ethnic group must be employed as supervisors, skilled, and common labor."[95]

Said Senator Javits:

> "The fact is that the Bill is enforceable only in the courts and in no respect *imposes* a quota system or racial imbalance standard.
>
> "Another thing that people were put in fear about was seniority and trade unions. Governor Wallace said that union seniority systems would be abrogated and that white men's jobs would be taken and turned over to Negroes. That is untrue. The only thing that the bill will do—and the administration of existing state laws has confirmed it—is deal with outright cases of discrimination."[96]

That same day (May 20), Senator Humphrey introduced a newsletter "stating some of my observations on the Civil Rights bill, as to what it provides and what it does not provide."[97] In part, the newsletter stated:

> "The bill does not permit the federal government to *require* an employer or union to hire or accept for membership a quota of employees from any particular minority group."[98]

On May 22, Senator McGovern declared:

> "The bill does not *create* any hiring quotas."[99]

On May 25, Senator Humphrey introduced a brief explanation of the House bill prepared by his staff, which he said had been "read and approved by the bipartisan floor

[95] *Id.* at 11471.

[96] *Id.* at 11471 (emphasis added). Senator Javits was a Republican supporter.

[97] *Id.* at 11486.

[98] *Id.* at 11486 (emphasis added).

[99] *Id.* at 11768.

managers of the bill in both houses of Congress."[100] In pertinent part, the explanation provided:

> "The relief available is a court order enjoining the offender from engaging further in discriminatory practices and directing the offender to take appropriate affirmative action; for example, reinstating or hiring employees, with or without back pay . . .
>
> "The Title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. In fact, the Title would prohibit preferential treatment to any particular group, and any person, whether or not a member of any minority group, would be permitted to file a complaint of discriminatory employment practices. The Title does not provide for the reinstatement or employment of a person, with or without back pay, if he was fired or refused employment or promotion for any reason other than discrimination prohibited by the Title. The Title contains no provisions which would jeopardize union seniority systems, nor would anything in the Title permit the government to control the internal affairs of employers or labor unions. Employers would continue to be free to establish their own job qualifications provided they do not discriminate because of race, color, religion, sex, or national origin. . . ."[101]

c. The Dirksen-Mansfield Substitute.

On May 26, 1964, Senator Dirksen introduced the comprehensive "Dirksen-Mansfield" substitute for the House-passed bill, which left unchanged the basic prohibitory language of Title VII (§§ 703(a)-(d)), as well as the remedial provision (§ 706(g)), but which added several provisions (including § 703(j)) limiting or defining the scope of the substantive prohibitions.[102] Senator Dirksen explained that the substitute "represents not merely weeks but months of labor:"

[100] *Id.* at 11847.

[101] *Id.* at 11847.

[102] *Id.* at 11926-35.

> "When I first looked at the House Bill, I saw in it some inequities and imperfections and technical errors which did not satisfy me." [103]

The substitute was initially drafted and considered at four or five Republican Party conferences,[104] following which

> "at least five conferences were held, consecutively, in my office, attended by Senators who represent all shades of opinion with respect to this measure. Included also were the Attorney General, the Deputy Attorney General, and the Director of the Division of Civil Rights in the Department of Justice.
>
> • • •
>
> "As a result of the various conferences, and by the process of give and take, we have at long last fashioned what we think is a workable measure." [105]

Senator Dirksen opined:

> "I doubt very much whether in my whole legislative lifetime any measure has received so much meticulous attention. We have tried to be mindful of every word, of every comma, and of the shading of every phrase." [106]

Senator Kuchel explained that the substitute was designed, *inter alia*, to recognize the respective "responsibilities" of the Federal Government, the States, and, in "this free land of ours," "the American citizen." [107]

On June 1, Senators Mansfield, Dirksen, Miller, and Cooper engaged in a colloquy about the importance of establishing a legislative record explaining the meaning of the amendments accomplished by the substitute. As Senator Miller observed, while many Senators had received explana-

[103] *Id.* at 11935.

[104] *Id.* at 11935, 11936.

[105] *Id.* at 11935. The substitute was also cleared with the House leadership before being introduced in the Senate. *Id.* at 12594 (Senator Clark); *Vass, supra*, at 445.

[106] *Id.* at 11935.

[107] *Id.* at 11937.

tions in the respective Democratic and Republican caucuses, "that is not the point," as the courts would not have access to those caucuses in ascertaining the bill's meaning. What was needed were explanations on the record, "so that in future litigation—which is bound to occur—on this bill, a court will know what the intention of Congress was." [108] Senator Dirksen announced that he was preparing a title-by-title explanation of the amendments.[109] Senator Cooper noted that as Senator Dirksen was "the author in chief of most of the amendments," an explanation from him of their purpose "would provide a legislative interpretation." [110]

On June 3, Senator Clark made a lengthy speech about the changes in Title VII, which he characterized as "perhaps more extensive" than any in the rest of the bill. He said that "the credit or the blame—whichever it may be" should go to Senator Dirksen, who was principally responsible for them. "[T]he imprint of the thinking of the Senator from Illinois [Mr. DIRKSEN], is on the substitute." Clark's "candid political judgment" was that "if we want any bill at all enacted, we must take the Dirksen amendment," for otherwise there were not enough votes to obtain cloture; but this was a conclusion "reached . . . reluctantly." [111]

Senator Muskie characterized §§ 703(g) through (j) as "limit[ing] the term 'unlawful employment practice' by spelling out a number of situations that could not be considered unlawful." [112]

On June 4, Senator Humphrey made one of the two major presentations explaining the purpose of the Dirksen-Mans-

[108] *Id.* at 12275.

[109] *Id.* at 12275.

[110] *Id.* at 12276.

[111] *Id.* at 12593.

[112] *Id.* at 12618.

field substitute amendments. (The other was Senator Dirksen's written explanation the following day.) Senator Humphrey's full statement respecting § 703(j) was as follows:

> "A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of the bill have carefully stated on numerous occasions that title VII does not *require* an employer to achieve any sort of racial balance in his workforce by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly. This subsection does not represent any change in the substance of the title. It does state clearly and accurately what we have mentioned all along about the bill's intent and meaning."[113]

Senator Dirksen's "explanation of the changes made in the substitute amendment"[114] provided, as to § 703(j):

> "New subsection (j) provides that this title does not *require* preferential treatment be given any individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed, in comparison with the total number or percentage of such persons in that or any other area."[115]

On June 9, the Senate took up Senator Ervin's amendment, which proposed to delete Title VII from the bill.[116] Speaking in support of the amendment, Senator Sparkman predicted that Title VII would lead to imposed quotas despite "the so-called mitigating language" in the substitute (*i.e.* § 703(j)).[117] Senator Clark spoke in opposition:

> "This bill does not make anyone higher than anyone

[113] *Id.* at 12723 (emphasis added).

[114] *Id.* at 12817.

[115] *Id.* at 12819 (emphasis added).

[116] *Id.* at 13073.

[117] *Id.* at 13074.

> else. It *establishes* no quotas. It leaves an employer free to select whomever he wishes to employ. It enables the labor union to admit anyone it wishes to take in. It tells an employment agency that it can get a job for anyone for whom it wishes to get a job.
>
> "All this is subject to one qualification, and that qualification is to state: 'In your activity as an employer, as a labor union, as an employment agency, you must not discriminate because of the color of a man's skin. You may not discriminate on the basis of race, color, religion, national origin or sex."[118]

The Ervin amendment was defeated,[119] and the Senate then took up Senator Cotton's amendment to limit Title VII to employers of 100 or more employees.[120] In the course of the debate on this amendment occurred the only discussion in the entire Senate debates of the possibility that employers might wish to reserve jobs for minorities in order to assist them in overcoming their employment disadvantage. Senator Curtis raised this possibility, but he did so not in the context of an employer who might wish to eliminate racial imbalance, but rather with the example of an employer who "might wish to employ *almost entirely, or entirely,* members of a minority race in order to enhance their opportunity."[121] Senators Curtis and Cotton were in agreement that the bill as written would forbid this, a prohibition both thought regrettable.[122] Senators Curtis and Cotton both were opponents of Title VII.[123]

[118] *Id.* at 13079-80 (emphasis added).

[119] *Id.* at 13085.

[120] Id. at 13085. The bill proposed to cover employers of 100 or more immediately, but to apply in successive years to employers of 75, 50, and eventually 25. *Ibid.*

[121] *Id.* at 13086 (emphasis added).

[122] *Id.* at 13086. Senator Cotton observed, however, that it was unlikely that the Act would be administered so quixotically as to condemn an employer for attempting this. *Id.* at 13087.

[123] Both had just voted in favor of the Ervin Amendment to de-

Senator Humphrey spoke against the Cotton amendment, and in the course of a lengthy demonstration that Senator Cotton's concerns that small employers would be oppressed by Federal enforcement were unwarranted, included this statement:

> "Nothing in the bill or in the amendments *requires* racial quotas. The bill does not provide that people shall be hired on the basis of being Polish, or Scandinavian, or German, or Negro, or members of a particular religious faith. It provides that employers shall seek and recruit employees on the basis of their talents, their merits, and their qualifications for the job." [124]

The Cotton amendment was defeated.[125]

Cloture was finally voted on June 10, 1964.[126] On June 18 and 19, in anticipation of the final vote, many sponsors spoke in support of the bill's passage, and two referred to the subject of quotas.

Senator Miller bracketed the three distinct issues of "racial balance" which had been discussed during the debates—the three which the Republican sponsors in the House had made clear were neither required nor forbidden by the Act (*supra*, pp. 34-35)—and articulated the same view:

> "I think it well to point out that this bill makes it very clear that such controversial and community oriented problems as the busing of schoolchildren from one district to another and the sale or renting of privately owned housing according to the preference of the owner are left to the State and local governments for resolution. Also, under the equal employment opportunities provisions in title VII, the bill makes it very clear that . . . Federal Government interference with private businesses because of some Federal employee's ideas about racial balance or racial imbalance is not authorized." [127]

Senator Williams of Delaware introduced a letter he had received from Senator Dirksen answering certain questions he (Senator Williams) had asked about the bill. "Since [Senator Dirksen] was the author of several of the amendments approved by the Senate I felt it was important that his interpretation of their legislative intent be incorporated in the RECORD." [128] In pertinent part, the letter from Senator Dirksen, dated June 18, 1964 (the day preceding the Senate's final vote) read as follows:

> "DEAR JOHN: I have your letter of June 17 raising questions which have been brought to your attention . . . Let me set out your questions and then follow them with my views so that you will have a complete record in this letter.
>
> • • •
>
> "5. That an employer would be required to maintain a racial ratio in his employment roughly equivalent to the racial ratio existing in this community.
>
> "The Senate substitute bill expressly provides that an employer *does not have to* maintain any employment ratio, regardless of the racial ratio in the community.
>
> • • •
>
> "Sincerely,
>
> "Everett McKinley Dirksen". [129]

---

lete Title VII, *id.* at 13085; Senator Cotton ultimately voted against the entire Civil Rights Act because of its inclusion of Title VII, *id.* at 14511 (see also *id.* at 14190), and Senator Curtis voted for the Act only after expressing grave misgivings because of its inclusion of Title VII, *id.* at 14484.

[124] *Id.* at 13088 (emphasis added).

[125] *Id.* at 13093.

[126] *Id.* at 13327.

[127] *Id.* at 14313-14.

[128] *Id.* at 14329.

[129] *Id.* at 14329 (emphasis added). Senator Williams then provided his own comparison of the House and Senate bills (*id.* at 14331), including:

On June 19, 1964, the longest debate in the history of the Senate—83 days—came to an end: the Civil Rights Act was passed.[130]

5. House Consideration of the Senate Amendments

As the Senate had substantially amended the bill passed by the House, it was necessary for the House to consider whether it would concur in the Senate's amendments. The House Judiciary Committee brought the bill to the floor of the House (without an explanatory report) with a recommendation that the House concur in the Senate's bill.[131]

Three Republican members of the Judiciary Committee—all of whom had been signers of both the "Additional Views" in the Committee Report, *supra*, pp. 30-31, and of the memorandum quoted, *supra*, pp. 34-35—were the only Congressmen to refer to quotas during the House's debate on the Senate amendments. Representative Lindsay stated:

> "[W]e wish to emphasize that this bill does not *require* quotas, racial balance, or any of the other things that the opponents have been saying about it."[132]

Representative McCulloch, undertaking "to negate only a few of the most glaring inaccuracies that have had such wide dissemination," declared, *inter alia:*

"Third. The bill does not permit the Federal Government to interfere with the day-to-day operations of a business or labor organization.

"Fourth. The bill does not permit the Federal Government to *require* an employer or union to hire or accept for membership a quota of persons from a particular minority group.

"Fifth. The bill does not permit the Federal Government to destroy the job seniority rights of either union or non-union employees."[133]

And, Representative MacGregor announced what we submit is the correct synthesis of all the legislative history:

"Important as the scope and extent of this bill is, it is also vitally important that all Americans understand what this bill does not cover.

"Your mail and mine, your contacts and mine with our constituents, indicates a great degree of misunderstanding about this bill. People complain about racial 'balancing' in the public schools, about open occupancy in housing, about preferential treatment or quotas in employment. There is a mistaken belief that Congress is legislating in these areas in this bill. When we drafted this bill we excluded these issues largely because the problems raised by these controversial questions are more properly handled at a governmental level closer to the American people and by communities and individuals themselves. The Senate has spelled out our intentions more specifically.

"Title IV, as amended by the Senate, provides:

[Quoting § 407]

"The Senate laid to rest the fear that the Federal Government would begin to use GI and FHA mortgages to control home sales or rentals with the following amendment:

[Quoting § 601]

"Finally, Mr. Speaker, in the difficult area of equal employment opportunities, the Senate has added this language to title VII:

"Senate amendments specifically prohibit the Attorney General, or any agency of the Government, from *requiring* employment to be on the basis of racial or religious quotas.

"Under the Senate amendments, an employer *could* continue to hire only the best qualified persons even if they were all white and his factory was in an area with 50 percent Negroes." (emphasis added)

[130] *Id.* at 14299-14300, 14511.

[131] *Id.* at 15897.

[132] *Id.* at 15876 (emphasis added).

[133] *Id.* at 15893 (emphasis added).

[Quoting § 703(j)]

"Mr. Speaker, the Senate has improved this bill in clarifying its scope and coverage." [134]

A few minutes later, the House voted to concur in the Senate's amendments, thus enacting the Civil Rights Act of 1964,[135] and the President signed the Act later that same day.

6. The Interplay Between Title IV and Title VII

The link Representative MacGregor noted between the issues of "racial 'balancing' in the public schools" and "preferential treatment or quotas in employment" in the last passage quoted reflects a significant theme in the Congressional debates. The analogy Congress saw between the two issues confirms the conclusion that Title VII was not meant to prohibit the private adoption of racial quotas to eliminate racial imbalance.

Private quota programs to eliminate *de facto* segregation in employment were not yet a significant phenomenon by 1964. However, the New York and Chicago school systems were embarking upon voluntary programs to racially balance their *de facto* segregated school systems. The impact which the Civil Rights Act would have upon these programs was discussed at length, and a clear legislative decision was reached: the Act would neither require nor forbid racial balancing in *de facto* segregated school systems; that matter would be left to the free choice of local school authorities. Having made that decision in Title IV, Congress also applied it by analogy in Title VII.

a. The Decision Under Title IV

Title IV of the Civil Rights Act, as reported out by the House Judiciary Committee, authorized the Commissioner of Education to provide technical assistance and financial aid to assist school boards in desegregating *de jure* segregated school systems, and empowered the Attorney General to bring suits to compel desegregation of such school systems. In his opening speech in support of the bill on the floor of the House, Judiciary Committee Chairman Celler declared:

"There is no authorization for either the Attorney General or the Commissioner of Education to work toward achieving racial balance in [*de facto* segregated] schools. *Such matters, like appointment of teachers and all other internal and administrative matters, are entirely in the hands of the local boards. This bill does not change that situation.*" [136]

Representative Celler explained that this was an answer to the charge that "the bill would deprive public and private schools of the right to manage their own internal affairs. This is clearly not the case . . . Local authorities would remain in complete control of their school systems." [137]

This same view was repeatedly expressed in the Senate. As Senator Keating put it:

"That question is left entirely to the board of education of the city of New York and similar boards in every other community in the Nation. The bill expressly removes that question from any Federal control or Federal jurisdiction.

• • •

"[T]hat is a matter which should be dealt with by the board of education in the municipality involved and by the State concerned. The wording of the bill in that respect is exactly what it should be. The Federal Government should keep its hands off that matter." [138]

Senator Douglas:

"It would be possible for States and localities to follow such policies as they thought wise and proper, but it would not be a requirement of Federal law. This

[134] *Id.* at 15893.

[135] *Id.* at 15897.

[136] 110 Cong. Rec. 1518 (emphasis added).

[137] *Id.* at 1518.

[138] *Id.* at 5266.

is one of the issues with which we are trying to deal in Chicago.

• • •

"Not only is the racial imbalance question not dealt with in this bill, but the bill expressly and specifically excludes the problem of racial imbalance from the scope of the bill."[139]

Senator Cooper:

"In my judgment, [the subject of racial balance in schools] ought to be decided at the local level, by the local school board. In my opinion, jurisdiction over these problems will be there."[140]

See also 110 Cong.Rec. 7788 (Sen. Scott) (State and municipal law in this area "is not touched by Federal legislation"); 7098-7100, 8057, 8064 (Sen. Javits); 11761-62 (Sen. Douglas).

b. The Link to Title VII

Although Congress had no concrete examples of private quota programs to eliminate racial imbalance in employment, it saw the analogy between such programs and voluntary efforts to end *de facto* school segregation. The Title IV decision was predicated upon Congress' desire not to intrude unnecessarily into school board decision-making. A similar desire—not to intrude unnecessarily into managerial and collectively-bargained decision-making—was at the forefront of its consciousness in shaping Title VII. And thus it is not surprising that the Congressional decision to permit, but not to require, racial balancing in employment was repeatedly linked to the similar decision under Title IV.

The explanation, quoted in part earlier, of the Republican sponsors on the Judiciary Committee of Title VII as passed by the House put the point this way:

"The Civil Rights Bill, as passed by the House, does

[139] *Id.* at 6820.

[140] *Id.* at 6841.

not in any way *require, reward,* or *encourage:* (1) 'open occupancy' in private housing, (2) the transfer of students away from the neighborhood schools to create 'racial balance,' or (3) the imposition of racial quotas or preferences in either private or public employment of individuals.

• • •

"Title IV of the Civil Rights Bill provides that the Attorney General may institute a civil action to desegregate public schools or colleges . . . In creating this authority, however, the House specifically precluded the Attorney General . . . from taking action under this Title to *compel* the racial balancing of schools.

• • •

"[Under Title VII, upon] conclusion of the trial, the federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. But, Title VII does not permit the *ordering* of racial quotas in businesses or unions. . . ."[141]

In the Senate, a number of Senators noted the analogy between Titles IV and VII. Senator Kuchel introduced the House Republican sponsors' explanation (just quoted) at the close of his principal speech in support of the bill.[142] Senator Scott declared that Title VII, like Title IV, was not designed to integrate, but only to forbid discrimination.[143] Senator Allott urged addition of a provision such as § 703(j) because arguments were being made that the existence of a "racial balance" proviso in Title IV but not in Title VII implied "that Title VII is intended to require hiring to overcome racial imbalance in the workforce."[144] Senator Bayh declared:

"The Civil Rights bill does not permit the federal

[141] *Id.* at 6565-66 (emphasis added). See also *id.* at 1994 (Rep. Healey).

[142] *Id.* at 6565-66.

[143] *Id.* at 7789.

[144] *Id.* at 9881.

> government to transfer students among schools to create a racial balance in classrooms or schools. . . . The Civil Rights bill does not permit the federal government to interfere with the day-to-day operations of a business or a labor union; nor does the Bill require unions or employers to establish or maintain a quota from any particular minority group. . . ." [145]

Senator Miller added:

> "I think it well to point out that this bill makes it very clear that such controversial and community oriented problems as the busing of schoolchildren from one district to another and the sale or renting of privately owned housing according to the preference of the owner are left to the State and local governments for resolution. Also, under the equal employment opportunities provision in Title VII, the bill makes it very clear that . . . Federal Government interference with private businesses because of some Federal employee's ideas about racial balance or racial imbalance is not authorized." [146]

And, of course, when the bill returned from the Senate to the House, Representative MacGregor, speaking a few minutes before the vote which enacted the bill, emphasized the congruence in this regard between Title IV and Title VII as amended by the Senate, p. 65, *supra*.

C. The Meaning of the 1964 Legislative History

First, the focus of the debate in Congress was not on whether employers and unions would be left *free* to adopt quotas, but whether under Title VII the Federal Government could *require* quotas. To this latter question, Congress' answer was unequivocal:

(a) Quotas are not a remedy which courts may impose for proven discrimination under Title VII: Chairman Celler, one of the bill's managers in the House, the key Republican sponsors in the House, and Senators Humphrey and Kuchel, the co-managers in the Senate, made definitive statements to this effect,[147] which were seconded by others,[148] and never contradicated by any supporter of the bill. As Senator Humphrey explained,[149] the last sentence of § 706 (g)—authorizing hiring and promotion remedies only for the victims of discrimination—is the statutory provision which embodies the sponsors' intent in this respect.[150]

(b) An employer's or union's failure to adopt quotas to eliminate a racial imbalance is not itself "discrimination." The sponsors consistently contended that the bill as originally drafted made this clear,[151] but in the face of continuing charges to the contrary Senator Dirksen's compromise bill—the means of securing the Republican votes necessary to break the filibuster—expressly so provided in § 703(j).

Second, the answer to the question whether employers and unions would be *free* to adopt quotas to eliminate a racial imbalance is not quite as certain, because a few liberal Senators who were principal sponsors of the bill made statements, prior to the adoption of § 703(j), signifying their belief that such quotas would constitute "discrimi-

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[145] *Id.* at 10069.

[146] *Id.* at 14313-14.

[147] *Supra,* pp. 31-32, 34-35, 38-39, 40-41.

[148] *Supra,* pp. 46-47, 51-53, 53-54.

[149] *Supra,* pp. 38-39.

[150] In practice, Sen. Robertson's prediction to Sen. Humphrey—that no matter how clearly the statute might forbid quota remedies, the courts would impose them anyway (p. 46, *supra*)—has proved prescient. The Courts of Appeals that have faced the question have uniformly concluded, without citing the legislative history described above, that quotas are an available remedy under Title VII; they have differed only on the question of how broadly or narrowly that remedial power should be used. See, e.g., *United States* v. *Elevator Contractors Local 5,* 538 F.2d 1012 (3rd Cir. 1976); *EEOC* v. *Local 638,* 532 F.2d 821 (2nd Cir. 1976); *United States* v. *Ironworkers Local 86,* 443 F.2d 544 (9th Cir.), *cert. denied,* 404 U.S. 484 (1971).

[151] See pp. 32, 34, 45, 48-49, *supra.*

nation." Nevertheless, the decisive weight of the evidence is that, as § 703(j) on its face suggests, Congress did *not* intend to make it unlawful for employers and unions to adopt quotas to eliminate a racial imbalance. The following considerations all support that ultimate conclusion:

(a) Title VII was predicated solely on the Commerce Clause, and (in 1964) was addressed solely to the private sector. Congress understood, therefore, that it was writing on a clean slate.[152] At the time the bill was being considered, under federal law employers and unions were free to select and assign employees to segregate *or* integrate their workforces; the Constitution, of course, is inapplicable to such private decision-making. It was for Congress to decide the extent of the intrusion which Title VII would make upon this existing entrepreneurial freedom.

(b) The dynamic in both Houses was that the bill would not pass without the support of legislators who were traditional "conservatives" in the sense that they opposed expansive governmental intrusion into the free enterprise system and free collective bargaining.[153] These legislators, from the start, saw Title VII as containing the potential for far-reaching government dictation of day-to-day managerial and collective bargaining decisions. From the start, therefore, they announced that their support was conditioned upon acceptance of the principle that the bill would intrude upon private decision-making only to the extent necessary to address the evils at which the bill was aimed. As the Republican sponsors in the House declared, in their "Additional Views" accompanying the House Report reporting out the bill:

> "[M]anagement prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor unions must not be interfered with except to the limit extent that correction is required in discriminatory practices."[154]

[152] *Supra*, pp. 16-18.

[153] *Supra*, pp. 18-19.

This philosophy was repeatedly expressed by conservatives, and liberals invariably acknowledged that this was a basic principle underlying the bill.[155]

(c) In the original House debate on Title VII, there is absolutely *no* indication that anyone thought Title VII would invalidate private decisions to eliminate racial imbalance in employment; and at the end of that debate, the Republican sponsors announced that under Title VII governmental imposition of quotas was forbidden, but private adoption was permissible (albeit not "rewarded" or "encouraged").[156]

(d) The Senate debate divides into two parts: before § 703(j), and after. In the first period, a few liberal Senators expressed their view that Title VII reached all race-conscious selection decisions. None of these addressed a race-conscious program to integrate such as is here involved. Rather, in each instance, it was an expansion of an argument to show that Title VII does not *require* quotas.[157] But their views do not express the will of Congress. For the conservative Republicans whose votes were critical to ending the filibuster redrafted the bill, added § 703(j), and in the words of Senator Dirksen, created a statute under which employers "do not have to" engage in racial balancing.[158] From the date of § 703(j)'s introduc-

[154] *Supra*, p. 31.

[155] *Supra*, p. 19, note 19.

[156] *Supra*, p. 34-35.

[157] Given the strong recognition by these Senators that Title VII would not succeed in elevating minorities from their economic disadvantage absent concomitant training ("they are as interdependent as the chicken and the egg"), see pp. 83-84, *infra*, it is questionable whether even *they* would have disapproved expanding the opportunities of minorities for training through programs such as that here.

[158] *Supra*, p. 63.

tion forward, not even the liberals suggested that Title VII *forbade* private decisions to eliminate racial imbalance.

(e) When the Senate bill returned to the House, its application to quotas was discussed only by the Republican sponsors, and they expressly stated that the bill neither required nor forbade racial balancing, but instead left the matter to private decision-making.[159]

(f) Congress focused specifically on racial balancing in Title IV of the bill, and made a considered determination that the choice whether to engage in racial balancing to end *de facto* discrimination should be left to local decision-making. This choice was predicated upon an expressed deference to school board autonomy, quite similar to the deference expressed for "managerial prerogatives, and union freedom," and Congress recognized the analogy between its decision in the two titles.[160]

D. The 1972 Legislative History

The only post-1964 legislative consideration of Title VII claimed by any party to be relevant here is that which occurred in 1972, culminating in the Equal Employment Opportunity Act of 1972, P.L. 92-261. For present purposes it is dispositive that the 1972 EEO Act did not change a word in § 703, and that no new language was added elsewhere in the Act relating in any way to quotas.[161] Moreover, even if one were willing to draw inferences as to the meaning of a statute from votes rejecting proposed amendments to that statute eight years later, there were no votes which could conceivably reflect the view of the 1972 Congress as to the 1964 Act's application to quotas.

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[159] *Supra.* pp. 64-65.

[160] *Supra,* pp. 66-70.

[161] A minor change was made in § 706(g), but as we show *infra,* p. 79, it merely reinforced the courts' power to grant victims of discrimination "rightful place" relief.

Indeed, there were no votes at all in the House on any proposed amendments dealing with quotas.[162]

In the Senate, Senator Ervin introduced two amendments to expressly prohibit government compulsion of quotas under either Title VII or Executive Order 11246. He argued that the 1964 Act already forbade any such compelled quotas, but that government officials were ignoring that prohibition and thus a more explicit direction was needed.[163] Senators Javits and Williams opposed these amendments, arguing, *inter alia,* that what government officials were imposing were "goals" and "timetables," not "quotas"; that the Ervin Amendments as worded would render Title VII entirely unenforceable, precluding even "rightful place" relief; and that current developments in the implementation of Title VII and the Executive Order should be allowed to continue.[164] The Ervin Amendments were defeated.[165] The Senate thus determined to leave § 703 as enacted in 1964.

An expression of views by one house of the 92nd Con-

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[162] The House Committee on Education and Labor reported out a bill which, *inter alia,* would have given the EEOC the authority to issue cease and desist orders, and would have transferred to the EEOC the authority to enforce Executive Order 11246. Rep. Dent, who was the bill's floor manager, proposed an amendment to the bill to prohibit the EEOC "from imposing or requiring a quota or preferential treatment." There was an inconclusive discussion of the amendment, with some speakers indicating that the prohibition already existing in Title VII would by its terms become applicable to the EEOC should the EEOC acquire decision-making power. The amendment never came to a vote, however, because meanwhile the Committee bill was replaced by a substitute (the Erlenborn substitute) which did not vest the EEOC with any decision-making powers. Rep. Dent's amendment thus was moot. For the consideration of the Dent amendment, see 117 Cong. Rec. 31784, 31965-66, 31975, 32089-90, 32091.

[163] 118 Cong. Rec. 1662-64, 4917-18.

[164] 118 Cong. Rec. 1664-65, 4918.

[165] 118 Cong. Rec. 1676, 4918-19.

gress (assuming the defeat of the Ervin Amndments can be determined to have expressed a particular view) cannot alter the meaning of a statute positively enacted by both houses of the 88th Congress.

II. ALTERNATIVE THEORIES PREMISED UPON ASSUMED GOVERNMENTAL POWERS ARE NOT APPROPRIATE BASES FOR DECIDING THIS CASE.

In part I, we established that Title VII does not prohibit private parties from adopting quota programs of the type at issue here. On that basis the decision of the court below should be reversed. We believe that no other issue is presented.

In this part of the brief, we state our position with respect to two alternative theories which the government, and others, have sought to insert into this case: First, that even if programs of the type here are generally forbidden by Title VII, there is nevertheless a zone in which private parties are permitted to adopt such programs, a zone which is derived from the presumed power of courts to order quotas as remedies in Title VII cases—*i.e.* the power of courts to direct that a defendant employer or union, found to have violated Title VII, establish a program of racial preferences to benefit persons who were not *victims* of the Title VII violation. Second, that even if private voluntary programs such as that here are violative of Title VII, employers and unions may nevertheless be authorized to undertake such programs by the Office of Federal Contract Compliance (OFCC).

We submit that the decision of this case cannot depend upon either of these theories. We deal with each in turn.

A. Obviously, if we are correct in our position stated in part I, the question whether some zone in which private quota programs, otherwise violative of Title VII, are permissible, may somehow be derived from an assumed power of courts to order quota relief in Title VII cases, never arises. For, if Title VII does not prohibit private quota

programs to eliminate a racial imbalance there is no reason to consider the convoluted route offered by this theory just to reach the same end.

If our position stated in part I is wrong, it would still be inappropriate to consider this alternative theory here because the factual predicate for the theory is not presented on the record of this case. The major premises for the theory are as follows: courts may, upon finding discrimination in violation of Title VII, order quota "remedies"; Title VII favors voluntary compliance; therefore, private parties ought to be able—*in those instances where they can establish that there might be some predicate for a court to act*—to avoid litigation by voluntarily putting into place the kinds of remedies courts would order. The limitation that the parties can establish the existence of some predicate for a court-ordered quota is critical to this alternative theory; otherwise, the results of the theory would outrun its rationale. But, the record of this case establishes neither that the parties considered whether there was a reasonable basis for a court-ordered quota in this case, nor that such a basis in fact existed.

As the record shows, the quota program for filling craft apprenticeship vacancies at the Gramercy plant was established as part of a nationwide agreement between Kaiser and USWA covering 15 Kaiser plants throughout the United States. Kaiser and USWA entered into that program without making a plant-by-plant assessment of whether a plaintiff might be able to prove a *prima facie* case of discrimination against blacks in entry into craft jobs, and without such an assessment at the Gramercy plant in particular. The Kaiser officials who negotiated the program did not believe Kaiser had engaged in such discrimination. And, the courts below found as fact that Kaiser had not discriminated against blacks in filling craft jobs at the Gramercy plant. USWA Pet. App. A at 5a-6a; USWA Pet. App. B at 31a-32a.

Therefore, the validity of the alternative theory—that a

right of private parties to establish quota programs may be derived from the courts' power to order such programs as a "remedy" for discrimination—is not presented on this record.

However, because we are troubled by the practical implications of this theory,[166] and because others press it upon the Court in this case, we discuss briefly several apparent flaws in this theory.

The major flaw in the theory is that, as we showed in part I, Congress expressly rejected its first premise. Floor leaders and principal supporters of Title VII in both Houses assured their fellow members in unambiguous terms that under no circumstances would Title VII empower courts to direct defendants to adopt racial quotas, even in cases where discrimination in violation of the Act is proven. See, *e.g.*, *supra,* at 31-32, 34, 38-39, 40-41, 46-47, 51-53, 53-54.

Those assurances were firmly grounded in the language of both the prohibitory and remedial sections of the bill as enacted. What Title VII forbids is discrimination "against any individual." § 703(a)-(d). The hiring, reinstatement, and promotion remedy it provides, set forth in § 706(g), is solely for "individuals" who have been victims of such violations. Section 706(g) specifically states that "[n]o

[166] While it is clear, as discussed above, that the theory requires that the parties establish that there would have been some reasonable basis for a court to have directed a quota program, it is not so clear what kind of showing would suffice. It is only in the context of this theory, for example, that the following questions raised by the Government and by Kaiser in their respective petitions become relevant: Must the parties to a quota program admit they engaged in prior discrimination? Must they establish that a *prima facie* case of discrimination could have been proven against them? That such questions need to be asked may reveal the inherent deficiency of the theory itself. But, in any event, whatever the standard might be, it would limit the ability of private parties to adopt such programs, and might jeopardize existing programs that USWA has negotiated throughout the steel, aluminum and can industries.

order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee" if such individual was not a victim of a Title VII violation.

In 1972, Congress amended § 706(g) in several respects. The language just quoted and the philosophy of the provision as enacted in 1964 were, however, left intact. The definitive explanation of the 1972 amendments to § 706(g) is contained in the Section-By-Section Analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972—Conference Report, 118 Cong. Rec. 7166, 7168 (1972):

> *Section 706(g)*—This subsection is similar to the present section 706(g) of the Act. It authorizes the court, upon a finding that the respondent has engaged in or is engaging in an unlawful employment practice, to enjoin the respondent from such unlawful conduct and order such affirmative relief as may be appropriate including, but not limited to, reinstatement or hiring, with or without backpay, as will effectuate the policies of the Act....
>
> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

See, *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 764 (1976).

Thus, the remedial concept of the 1964 Act was confirmed by the 1972 Congress: victims of proscribed conduct under

Title VII are to be "restored to a position where they would have been were it not for the unlawful discrimination"; for non-victims, courts may not order, in the words of § 706(g), "the hiring, reinstatement, or promotion of an individual as an employee."

The limitation of these remedies under Title VII to so-called "rightful place" relief is true to the construction given to the model used by Congress in drafting § 706(g): § 10(c) of the National Labor Relations Act. See *Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 769, 774-775, and n. 34; *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 419 (1975). Quota "remedies" have never been awarded under § 10(c).[167]

The assumption that once a court in a Title VII case finds discrimination of some sort, it may then award a hiring, reinstatement or promotion remedy directed not at making-whole a victim of that discrimination but at providing a benefit to a non-victim—because that non-victim is the same race as the actual victim—is at odds with the remedial scheme of Title VII as just described.[168] This Court has

[167] When an employer is found to have discriminated against union members in hiring to avoid unionization, in violaton of 8(a)(3) of the National Labor Relations Act, the remedy awarded under § 10(c) by the National Labor Relations Board is to reinstate the victims of the discrimination and award them backpay and rightful place seniority; the Board has never directed an employer to give preferential treatment in future hiring to union members who were not victims of the violation. See *Franks, supra* at 774-775, n. 34; see, *e.g., Nevada Consolidated Copper Corp.,* 26 NLRB 1182, 1231 (1940), enforced, 316 U.S. 105 (1942); *Consolidated Dairy Products,* 194 NLRB 701 (1971); *Great Lakes Bridge & Dry Dock Co.,* 169 NLRB 631, 635 (1968); *The Hughes Corp.,* 135 NLRB 1222, 1223 (1962); *Atlantic Maintenance Co.,* 134 NLRB 1328, 1330 (1961), enforced, 305 F.2d 604 (3d Cir. 1962).

[168] Likewise in school desegregation cases, this Court has stated the remedial principle as follows: "the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible

never held that Title VII grants courts authority to award preferential treatment to non-victims. Indeed, this Court has twice been careful to limit the remedy for a Title VII violation to the restoration of the individual victims of the violation to their "rightful place." *Franks* v. *Bowman Transportation Co., supra,* 424 U.S. at 772-773, and n. 32; *Teamsters* v. *United States,* 431 U.S. 342, 362-376 (1977).[169] All of the opinions in *Franks* suggested that where injunctive remedies will subordinate the job rights of competing innocent employees, the equitable principles which control

'to restore the victims of discriminatory conduct to the positions they would have occupied in the absence of such conduct'." *Milliken* v. *Bradley,* 433 U.S. 267, 280 (1977). In school cases, the violation generally consists of practices intentionally maintained by a school board for the purpose of segregating the races. All minority students affected by such practices are by definition victims of the violation. To make such victims whole may require both the "dismantling" of the discriminatory practices and the affirmative correction of educational deficiencies which resulted from those practices. *Milliken* v. *Bradley,* 433 U.S., *supra* at 282-283; *Swann* v. *Board of Education,* 402 U.S., 1, 28, 31-32. In that context, make-whole relief may require such actions as race-conscious assignment policies for teachers and pupils alike. But, in that context, too, this Court has been careful to confine remedial decrees to the make-whole purpose, and has not permitted such decrees to be used to achieve goals, such as racial balancing, beyond that purpose. *Swann, supra,* at 15-16, 31-32; *Pasadena City Bd. of Education* v. *Spangler,* 427 U.S. 424, 435-437 (1976); *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 419-420 (1977).

[169] Under *Frank* and *Teamsters,* when a class violation is proven, the burden of proof shifts to the defendant to establish that individual members of the class against whom the violation was committed were not actually victims of the violation. This shift in the burden of proof is not equivalent to providing preferential treatment to non-victims. The issue remains, who were victims of the unlawful practice? Members of the class against whom the practice was committed—*e.g.* black applicants for jobs from an employer who was proven to have had an across-the-board practice of refusing to hire blacks—are presumed to be victims, unless the defendant proves otherwise.

the fashioning of relief under Title VII require that such remedies be tailored to righting the wrong that was done and no more.

Further, the only conceivable occasion for the Court to address the alternative theory now under discussion would be if the Court rejects the position stated in part I of this brief. But, if we are wrong in our position stated there, then quota programs of the type at issue here are themselves violative of Title VII: they are the kind of "discrimination" Congress meant to outlaw. On this assumption, to uphold the alternative theory, this Court would have to find that Congress authorized courts, upon the occasion of a Title VII violation, not only to make the victims of the violation whole, but also to direct the very type of racial quota program that Congress in the same statute prohibited as unlawful discrimination. The Court in construing the model for Title VII's remedial provisions—§ 10(c) of the NLRA—has refused to attribute to Congress the intent to achieve such an anomalous result. See *Porter Co.* v. *NLRB*, 397 U.S. 99, 107-108 (1970).

B. If we are correct in our position stated in part I, there is no reason, either, to consider the second alternative theory—that the OFCC, pursuant to Executive Order 11246, may authorize private parties to adopt quota programs otherwise violative of Title VII. If, as we showed in part I, Title VII does not prohibit the kind of program here at issue, authorization from OFCC would be unnecessary.[170] If the position for which we contended in part I is not correct, then all quota programs of the type at issue here violate Title VII. The OFCC cannot, by virtue of power derived from an executive order, make legal what Congress has

[170] Nor does this case present an occasion to decide whether the OFCC may *require* private parties to adopt such programs. The courts below found the program here to have been voluntarily adopted by USWA and Kaiser; throughout this case neither of those parties has claimed that OFCC forced them into the agreement, nor that OFCC lacks the authority to do so.

made illegal. "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at the lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Justice Jackson, concurring). If quota programs to correct a racial imbalance are unlawful discrimination under Title VII, the OFCC has not been ordained to bless them nevertheless.

Accordingly, the outcome of this case necessarily turns upon the issue presented in part I of this brief: whether private parties may voluntarily adopt quotas to eliminate racial imbalance.

III. FINAL CONSIDERATIONS.

This brief would not be complete, without three concluding observations which cut across all of the discrete legal points discussed above.

1. The Congress which enacted Title VII knew that that Title could not, standing alone, materially reduce the economic distress of blacks and other minorities which was the impetus for its enactment. As Senator Humphrey explained, in stating the "affirmative case" for the bill:

> "The crux of the problem is to open employment opportunities for Negroes in occupations which have been traditionally closed to them. This requires both an end to the discrimination which now prevails *and an upgrading of Negro occupational skills through education and training. Neither task can be given priority over the other. They are as interdependent as the chicken and the egg and must be attacked simultaneously.* Negroes cannot be expected to train themselves for positions which they know will be denied to them because of their color. Nor can patterns of discrimination be effectively broken down until Negroes in sizable numbers are available for the jobs to be filled." [171]

[171] 110 Cong. Rec. 6548 (emphasis added).

This point was reiterated throughout the debate over Title VII.[172]

Congress did not, of course, *require* that employers and unions provide preferential access for disadvantaged minorities to training programs. But it would be ironic if a law triggered by a Nation's guilt over centuries of racial injustice constituted the first prohibition of private endeavors to accelerate the elimination of the vestiges of that injustice. And it would be particularly ironic if that result were predicated upon isolated remarks of Senators Humphrey, Case, and Clark, whose anguish over the present consequences of historic discrimination was eloquently stated during the debates on Title VII.[173]

2. There is more to legislative restraint than simply leaving decision-making in private rather than public hands. There is the prospect that private decision-making—here collective bargaining—can produce results which are beyond the ingenuity or even constitutional authority of the government. This case provides a particularly apt demonstration of that truism. There would be no training program at Gramercy today were it not for the parties' quota agreement. USWA had sought such a training program for many years, but Kaiser had continually demurred on the ground that it was too costly. In consequence, all of the production employees at the plant, including Brian Weber and the entire class he represents, were without any hope of ever achieving a craft job. The negotiation of the nationwide

[172] "National prosperity will be increased through the proper training of Negroes for more skilled employment together with the removal of barriers for obtaining such employment." H.Rep. No. 914, *supra*, p. 149 (Additional Views of Republican sponsors); see also, *e.g.*, at 1639 (Representatives Reid and Lindsay); 2585 (Representative Reid); 2600 (Representative Celler); 2604 (Representative Ryan); 7241 (Senator Case); 8348-49 (Senator Proxmire); 9678 (Senator Clark); and 12615 (Senator Muskie).

[173] See, *e.g.*, *id.* at 6547-48 (Senator Humphrey); id. at 7247, 14287 (Senator Case); *id.* at 13079, 13081 (Senator Clark).

USWA-Kaiser quota program made it imperative that Kaiser establish training programs, and thereby created opportunities for whites as well as blacks which would not otherwise have come into being.

3. In our petition we stated:

> "USWA has embarked upon a nationwide program which, if allowed to continue, will soon produce a major alteration in the status of blacks in important segments of American industry. In a very few years, this nation will see a new generation of many thousands of fully trained black craftsmen. This is not a result which government has commanded (or perhaps could command), but it is a result which private, voluntary collective bargaining can produce. The court below has declared that Title VII forbids this program. It is imperative that this Court grant certiorari and decide whether that result is what Congress intended."

The statutory analysis set forth in this brief establishes that that result is *not* what Congress intended.

CONCLUSION

The decision and judgment of the court below should be reversed.

Respectfully submitted,

J. ALBERT WOLL
Woll & Mayer
815 Fifteenth St., N.W.
Washington, D.C. 20005

LAURENCE GOLD
American Federation of
Labor and Congress of
Industrial Organizations
815 Sixteenth St., N.W.
Washington, D.C. 20006

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG
ELLIOT BREDHOFF
FRANK PETRAMALO, JR.
Bredhoff, Gottesman, Cohen
& Weinberg
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

BERNARD KLEIMAN
CARL FRANKEL
Five Gateway Center
Pittsburgh, Pennsylvania
15222

JEROME A. COOPER
JOHN C. FALKENBERRY
Cooper, Mitch & Crawford
409 N. 21st Street
Birmingham, Alabama 35203

Attorneys for United
Steelworkers of America